Supreme Court, U.S.
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IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1998

UNITED STATES OF AMERICA,
RESPONDENT,

v.

PAUL WAYNE DERRICK, LARRY BLANDING and
JEFFERSON MARION LONG JR.,
PETITIONERS.

On Petition for Writ of Certiorari to the
United States Court of Appeals
for the Fourth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

I. Whether the District Court's findings that government agents engaged in repetitious and egregious misconduct by failing to disclose exculpatory and material evidence to the criminal defendants and allowing perjured testimony to be submitted to the Court were properly found to be clearly erroneous by the Court of Appeals.

II. Whether, in light of the pattern and nature of the prosecutorial misconduct found by the District Court, it was within the District Court's power to dismiss the indictments charging the Petitioners with violations of the Hobbs Act in connection with their service as members of the South Carolina General Assembly.

LIST OF PARTIES TO PROCEEDINGS BELOW

Pursuant to Sup. Ct. R. 14(b), the Petitioners submit the following list of parties to the proceedings before the United States Court of Appeals for the Fourth Circuit.

The Petitioners are Paul Wayne Derrick, Larry Blanding, and Jefferson Marion Long Jr., a/k/a "Bud," who were Appellees-Defendants in the Court of Appeals. In addition, the Court of Appeals allowed the following to participate as amicus curiae on the side of the Appellees:

- Alva Taylor Brown, Personal Representative of the Estate of Luther Langford Taylor;
- The Estate of Benjamin J. Gordon, a/k/a "B.J.";
- The National Association of Criminal Defense Lawyers.

The Respondent, who was the Appellant-Plaintiff below, is the government of the United States of America. In addition, the Court below allowed the following persons to participate as amicus curiae on the side of the Appellant:

- Dale L. DuTremble;
- E. Bart Daniel;
- Richard Greer.

There are no parent companies or nonwholly owned subsidiaries involved in this case.

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The opinion and order of the United States District Court for the District of South Carolina dismissing the indictments is reported in *United States v. Taylor*, 956 F. Supp. 622 (D.S.C. 1997), and is set forth in the Appendix beginning at A-87.

The opinion and order of the United States Court of Appeals for the Fourth Circuit vacating the order of the District Court is reported in *United States v. Derrick*, 163 F.3d 799 (4th Cir. 1998), and is set forth in the Appendix beginning at A-1. The order of the Court of Appeals denying the Petitioners' motion for rehearing and, by a vote of 6 to 5, suggestion for rehearing en banc is set forth in the Appendix at A-184, -185, -186. The order of the Court of Appeals denying the Petitioners' motion to stay the mandate is set forth in the Appendix at A-187, -188, -189.

STATEMENT OF JURISDICTION

The order and judgment of the United States Court of Appeals for the Fourth Circuit vacating the District Court's judgment was entered on November 23, 1998. (A-2.) The Petitioners timely filed a petition for rehearing and suggestion for rehearing en banc on December 7, 1998. The Court of Appeals' order denying rehearing and suggestion for rehearing en banc was filed on January 25, 1999. (A-184.)

This Court has jurisdiction to review the orders and judgment of the Court of Appeals under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

U.S. Const. amend. V provides as follows:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public

danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

STATEMENT OF THE CASE

These criminal cases resulted from a federal undercover sting operation which targeted the South Carolina General Assembly. A federal grand jury in South Carolina returned two-count indictments on February 20, 1991 and August 20, 1991, charging Petitioners Paul Wayne Derrick and Jefferson Marion ("Bud") Long Jr., respectively, with violations of the Hobbs Act, 18 U.S.C. § 1951. (A-91, -92.) Petitioner Larry Blanding was charged with Hobbs Act violations in a six-count indictment returned on September 21, 1990. (A-91.) The United States District Court for the District of South Carolina had jurisdiction over these criminal actions under 18 U.S.C. § 3231.

The sting, code-named "OPERATION LOST TRUST," began after the arrest of lobbyist Ronald L. Cobb on drug charges; Cobb offered to help the FBI make corruption charges against South Carolina legislators in return for transactional immunity. (A-89.) OPERATION LOST TRUST eventually involved the investigation of numerous state legislators and lobbyists and the return of federal indictments against several members of the South Carolina state legislature, including the Petitioners Derrick, Blanding, and Long. (A-91, -92.)

Each Petitioner was tried separately from the others in the District Court and convicted. Derrick's and Blanding's convictions were reversed and their cases remanded for new trials in separate appeals to the Court of Appeals for the Fourth Circuit because of improper jury instructions. *United States v. Derrick*, No. 92-5084 (4th Cir. Feb. 7, 1994), and *United States v. Blanding*, No. 91-5871 (4th Cir. June 22, 1992) (citing *United States v. Taylor*, 966 F.2d 830 (4th Cir. 1992), *aff'd on reh'g*, 993 F.2d 382 (4th Cir.), *cert. denied*,

510 U.S. 891 (1993)). Petitioner Long's motion for a new trial was granted by the District Court because evidence had been improperly submitted to the jury, and this ruling was affirmed on appeal. *United States v. Long*, No. 92-6799 (4th Cir. Feb. 25, 1994). (A-92.)

Prior to any retrial, the Petitioners joined in motions made in the related OPERATION LOST TRUST cases to dismiss the indictments because of prosecutorial, agency, and/or investigative misconduct. (A-93, -94.) The District Court heard extensive testimony, reviewed volumes of documents, and received oral and written arguments in connection with the motions to dismiss. (A-97.) On February 28, 1997, the District Court issued an 86-page opinion and order granting the motions of the Petitioners and the other defendants to dismiss the indictments, finding extensive prosecutorial misconduct amounting to "fraud upon the court." (A-176.)

The prosecutorial misconduct found by the District Court was pervasive, and its full scope was discovered only when the government produced volumes of discovery material that had not been produced in the earlier trials, as well as transcripts of grand jury proceedings and hearings which had been closed at the request of the government. (A-93.) The disclosure of this new discovery material prompted an investigation by the Department of Justice's Office of Professional Responsibility and the eventual recusal of the entire office of the United States Attorney for the District of South Carolina. (A-93.) The newly disclosed evidence also prompted the District Court to order that the government disclose to the defendants all of the materials in the government's possession concerning these cases which had not been made available to the defendants previously. (A-95, -96.)

After hearing testimony and the arguments of all sides over a three-year period, the District Court made extensive findings of misconduct including, but not limited to, the following:

- The government knowingly withheld written interview records (FD-302s) and audio and video tapes which would have impeached Cobb's testimony, the government's primary evidence inculpating Petitioners, that Cobb considered any

money he gave to the defendants to be illegal bribes to influence their actions as legislators, as opposed to legal campaign contributions (A-110, -114, -115, -118);

- An FBI agent falsely denied the existence of any notes of an interview of Cobb, which notes were eventually disclosed to the defendants pursuant to a District Court order after the Court of Appeals ordered a new trial (A-127, -128, 129, 180);

- The government prosecutors allowed Cobb's perjurious testimony that he had not given bribes to other legislators to stand uncorrected (A-128, -180);

- On several occasions, the United States attorneys handling these series of related prosecutions made false representations that all exculpatory and impeaching discovery material to which the defendants were entitled had been turned over to the defendants (A-131, -132, -174, -177, -178); and

- United States attorneys allowed false testimony to be presented to the grand jury investigating this matter (A-137, -138, -180, -181).

As summarized by the District Court, "the misconduct here is repetitious, flagrant and longstanding." (A-175.) Based upon these findings, the District Court ruled that the only remedy available to the defendants commensurate with the misconduct was dismissal of the indictments with prejudice and entered an order accordingly. (A-89.)

The United States appealed that order, as it applied to the several cases, to the Court of Appeals, which vacated the District Court's order and remanded the cases for retrial. Citing *United States v. Hasting*, 461 U.S. 499 (1983), the Court of Appeals first held that because a court may not, without finding prejudice to the defendant, exercise its supervisory power to reverse a defendant's conviction because of prosecutorial misconduct, "a court may not dismiss an indictment altogether on this ground without also finding

prejudice." (A-14.) It ruled that none of the cases cited by the District Court "can overcome the force of the controlling Supreme Court authority requiring the district court to find prejudice to the defendants before dismissing indictments based upon prosecutorial misconduct." (A-19.) The Court of Appeals then stated that "any prejudice that arguably existed as a consequence of discovery violations is fully remedied by this court's order of new trials." (A-19.)

The Court of Appeals also rejected the contention that the District Court's order of dismissal could be upheld because the evidence showed a pattern of prosecutorial misconduct. Although recognizing that the decisions in *Bank of Nova Scotia v. United States*, 487 U.S. 250, 259 (1988), and *United States v. Morrison*, 449 U.S. 361, 365 n.2 (1981), alluded to the possibility that a pattern of misconduct could warrant dismissal of an indictment, the Court of Appeals ruled that even if dismissal was an available remedy when a pattern of misconduct is shown, "we doubt that the [Supreme] Court would apply it where, as here, alternative sanctions—including publicly chastising the attorneys and recommending them for disciplinary proceedings—were available to the court and were not employed prior to dismissal of the indictments." (A-21.)

Notwithstanding this ruling, the Court of Appeals went on to address the sufficiency of the evidence supporting the District Court's findings of prosecutorial misconduct and found each and every one of those findings to be contrary to the record. The Court of Appeals premised its decision to overturn every finding by stating that the District Court relied "upon only defense claims of intentional wrongdoing, rather than upon an independent analysis of the record evidence" (A-22), and made the following specific rulings concerning the findings below:

- Evidence showing that Cobb arbitrarily characterized monies paid to legislators as bribes or campaign contributions was not exculpatory or material, and so nondisclosure of the evidence did not violate the Petitioners' constitutional rights (A-40, -41, -42);

- The Court of Appeals reversed the finding that Cobb committed perjury in testifying that monies given to some legislators were not bribes, and that the government knowingly allowed this perjury to stand, on the basis that Cobb could have subjectively believed his payments were not bribes (A-70, -71);

- The Court of Appeals reversed a finding that Cobb and Special Agent Clemens committed perjury by misrepresenting the purpose for their late-night visit to a legislator's confidante, even though the District Court had relied upon conflicting statements made in testimony before it and the circumstances of the visit, deeming the evidence insufficient to support this finding (A-56, -57, -58); and

- A finding that the government knowingly had allowed perjury before the grand jury by Richard Greer, former Chairman of the South Carolina Development Board, which was based upon conflicting assertions made by the government to the District Court at different times, was overturned by the Court of Appeals (A-67, -68, -69).

The Court of Appeals also relied upon what it considered to be conflicting findings made by the District Court. (A-74, -75, -76.) The asserted conflict was between findings made five years before the motions to dismiss were granted and before additional discovery by the defendants had occurred and the ultimate findings made by the District Court. The Court of Appeals concluded that the findings of prosecutorial misconduct "are simply unsupported by the record before the court." (A-85.)

The Petitioners timely filed a petition for rehearing and suggestion for rehearing en banc. (A-186.) Five of the eleven members of the Court of Appeals qualified to vote on the suggestion voted that the case should be reheard en banc. (A-186.)

ARGUMENT

I. THE COURT OF APPEALS ERRED IN RULING THAT EACH OF THE DISTRICT COURT'S FINDINGS OF GOVERNMENT MISCONDUCT WERE NOT SUPPORTED BY THE EVIDENCE.

The standard of review appellate courts are to apply to factual findings made by district courts is set forth in *Amadeo v. Zant*, 486 U.S. 214, 223 (1988) (quoting *Anderson v. Bessemer City*, 470 U.S. 564, 573-76 (1985)), as follows:

> It is well settled, however, that a federal appellate court may set aside a trial court's findings of fact only if they are "clearly erroneous," and that it must give "due regard . . . to the opportunity of the trial court to judge the credibility of the witnesses." . . . We have stressed that the clearly-erroneous standard of review is a deferential one, explaining that "[i]f the district court's account of the evidence is plausible in light of the record viewed in its entirety, the court of appeals may not reverse it even though convinced that had it been sitting as the trier of fact, it would have weighed the evidence differently."

The "clearly erroneous" standard of review is fully applicable to factual findings made by district courts on preliminary matters in criminal actions. *Maine v. Taylor*, 477 U.S. 131, 145 (1986); *Campbell v. United States*, 373 U.S. 487, 493 (1963).

The deference required under the clearly erroneous standard is not merely a matter of blind respect toward the district court, but is based upon important distinctions between the roles of the district courts and appellate courts:

> The rationale for deference to the original finder of fact is not limited to the superiority of the trial judge's position to make determinations of

> credibility. The trial judge's major role is the determination of fact, and with experience in fulfilling that role comes expertise. Duplication of the trial judge's efforts in the court of appeals would very likely contribute only negligibly to the accuracy of fact determination at a huge cost in diversion of judicial resources. In addition, the parties to a case on appeal have already been forced to concentrate their energies and resources on persuading the trial judge that their account of the facts is the correct one; requiring them to persuade three more judges at the appellate level is requiring too much. As the Court has stated in a different context, the trial on the merits should be "the 'main event' . . . rather than a 'tryout on the road.'" *Wainwright v. Sykes*, 433 U.S. 72, 90 (1977). For these reasons, review of factual findings under the clearly-erroneous standard—with its deference to the trier of fact—is the rule not the exception.

Anderson, 470 U.S. at 574-75. Judicial efficiency, trial judge expertise, and the importance of first-hand observation combine to require the deference to district court factfinding embodied in the clearly erroneous standard of review. *Maine*, 477 U.S. at 145.

That the Court of Appeals failed to apply the clearly erroneous standard of review in the instant case is evidenced by its reversal of *each and every* factual finding made by the District Court. Indeed, the Court of Appeals did not even honor this standard of review in words, failing even once to mention the standard of review applicable to the District Court's factual findings. The Court of Appeals gave no deference to the superior position of District Court Judge Hawkins, who had presided over all eight trials and various proceedings involving OPERATION LOST TRUST spanning seven years. Instead, the Court of Appeals scoured the record for any basis upon which it could seize to absolve the prosecutors and government agents of the systematic misconduct found by the District Court.

The Court of Appeals' decision to reverse the findings made by the District Court was certainly error because those findings were supported by the voluminous evidence before the District Court. This Court stands in the same position as the Court of Appeals in determining whether the findings were "clearly erroneous." *McAllister v. United States*, 348 U.S. 19, 20-21 (1954). The following examples demonstrate the Court of Appeals' failure to follow the controlling standard of review:

1. ***Evidence of Perjury***: District Judge Hawkins found that Ronald Cobb, the lobbyist whose arrest and offer to provide information triggered OPERATION LOST TRUST and who whose credibility was absolutely crucial to the government's case against the LOST TRUST defendants, committed perjury when he denied during testimony that he never gave illegal money to other legislators, and Judge Hawkins further found that the government was aware of this perjury but allowed it to stand. (A-180.) The District Court found perjury was committed because: (1) Cobb's FD-302s and other government documents clearly referred to a particular exchange of money as a payoff, (2) Cobb consistently testified that monies given to Blanding, Derrick, Long, and other LOST TRUST defendants were bribes, yet Cobb referred to payments to other legislators as simply contributions for the purpose of maintaining favorable relations and not bribes for specific legislative action; and (3) in interviews not disclosed to the Petitioners, Cobb admitted that as a lobbyist he often had given campaign contributions and that he did not care what the recipients did with the money. In reversing this finding of perjury, the Court of Appeals speculated that Cobb could have *subjectively* believed his "payoffs" to other legislators were not bribes and so did not commit perjury. (A-70.)

This attempt by the appellate court to determine the "subjective" state of mind of a witness is precisely the kind of revisiting of facts on appeal which this Court's controlling precedent precludes. Indeed, when findings are based upon determinations involving credibility, even greater deference to a district court's findings are required. *Anderson*, 470 U.S. at 575. The District Court's finding that Cobb committed perjury was well supported by the evidence, including an affidavit by Special Agent Dick in which he indicated that these "payoffs" (as Cobb labeled them) constituted

illegal bribes and that this fact had been discussed with Cobb and other investigators. (A-129.) Special Agent Richards also testified that Cobb admitted to him that Cobb had paid $20,000 in illegal monies to the most prominent legislators. (A-129.) Although the Court of Appeals' decision recognized that this evidence was presented below (A-72), it simply chose to disregard it and made the kind of credibility determination which was exclusively the province of the District Court. *Amadeo*, 486 U.S. at 223.

The Court of Appeals also referred to a 1991 decision by Judge Hawkins denying a motion to dismiss based upon the same allegation of perjury as showing that the District Court made "inconsistent findings" and "abruptly reversed course" on this point in its 1997 decision. (A-75.) But this "abrupt reversal" occurred five years after the first decision and only after extensive additional discovery brought other evidence to light. (A-128, -129, -182.) The District Court's decision recognized that "[w]ithout the defendants' unrelenting pursuit of their motions, . . . much of what is now known may never have seen the light of day." (A-182.) Thus, the District Court did not make inconsistent findings in light of the evidence before it each time.

The District Court also found that Special Agent Clemens had committed perjury by testifying that he never prepared an FD-302 indicating that Cobb had made "payoffs" to State Senator John Lindsay, who had been excluded as a target of the sting operation. (A-127, -180.) This finding was based upon evidence that such an FD-302 prepared by Clemens was discovered by the defendants, the government's denial of its existence, and Clemens's explanation that he "forgot" it existed. The District Court found this explanation implausible in light of the prominence of Lindsay and others implicated by the FD-302 (A-131), and the fact that the underlying notes were taken by Clemens to his new home in Washington, D.C., when he was transferred. (A-127, -128.) Without supporting evidence, the panel concluded that the record "suggests" the "misstatements" by Clemens were the result of oversight, disorganization, and forgetfulness. (A-80, -81.) Again, it was the District Court's province to determine the credibility of Clemens's explanation. An appellate court should not substitute its judgment on credibility and findings of fact for those of a district court. *Id.*

2. ***Failure to Disclose Evidence***: The District Court found that "much of the government's misconduct actually stems from its failure to disclose evidence to the defendants" as required by *Brady v. Maryland*, 373 U.S. 83 (1963). (A-178.) Criticizing this finding, the Court of Appeals first referred to contradictions in the record as to whether the cases operated under an "open file policy" and concluded that the District Court's mistaken belief that an open file policy existed was the basis of much of the District Court's reasoning that the government had wrongfully withheld evidence. (A-29, -37.)

But the Court of Appeals' reference to an open file policy is a "red herring" because any such policy or lack thereof had no impact on the District Court's finding that the government withheld *Brady* material. The District Court's opinion merely referred to discussions about an open file policy; it did not rely upon the existence of an open file policy as the basis for finding that the government withheld *Brady* evidence. Indeed, the existence *vel non* of an open file policy does not affect the government's responsibility to disclose to defendants exculpatory evidence. Prosecutors have an independent duty to disclose evidence favorable to an accused even if a specific request for the evidence is not made by the accused. *See Kyles v. Whitley*, 514 U.S. 419, 433-34 (1995) (the government's duty to disclose evidence is triggered by the potential impact of favorable evidence). Notwithstanding any open file policy, the government was required to disclose to the Petitioners favorable evidence. If, as apparently concluded by the Court of Appeals, there was no open file policy in effect (A-29), then the failure of the government to disclose the *Brady* material was even more egregious because this was not a case where the defendants could have discovered the material by searching through the open files.

The Court of Appeals' further decision that the undisclosed evidence was not material or exculpatory proceeds from an erroneous view of what evidence is within the disclosure mandate of *Brady* and *Giglio v. United States*, 405 U.S. 150 (1972). The District Court properly focused on the fact that much of the undisclosed material showed that Cobb considered some monies given to legislators to be "campaign contributions" and not bribes. (A-113, -114, -118, -180.) Such evidence was crucial to the Petitioners and other defendants because it impeached Cobb's

testimony characterizing money he gave to the Petitioners as bribes. One withheld statement quotes Cobb as responding when asked to differentiate between those to whom he gave bribes and those who got campaign contributions that "that is a hard question to answer." (A-111.) The Court of Appeals held that such evidence was not exculpatory or material because it did not establish that the payments made to the Petitioners were not illegal bribes and only related to other legislators. (A-41, -44.)

But the fact that the withheld evidence did not directly negate an element of the charges against the Petitioners does not mean that it was not within the disclosure obligation of *Brady* and *Giglio*. In *United States v. Bagley*, 473 U.S. 667, 676 (1985) (emphasis added), this Court held that "*[i]mpeachment evidence, . . . as well as exculpatory evidence*, falls within the *Brady* rule." *Bagley* held that evidence showing that key government witnesses had a financial interest in testifying against the defendant should have been disclosed to the defendant if its disclosure could have changed the result of the trial. The undisclosed evidence concerning Cobb at issue here would have impeached his testimony that the monies given to the Petitioners were bribes because it showed Cobb to be inconsistent in denominating monies given as "bribes" or legal campaign contributions. The Court of Appeals was simply wrong in asserting that because the undisclosed material did not prove contributions given to the Petitioners were not bribes that it was not subject to the disclosure obligation of *Brady* and *Giglio*.

The District Court's conclusion that the undisclosed evidence was material also should not have been reversed by the Court of Appeals. Evidence is "material" "if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different." *Id.* at 682. Evidence impeaching Cobb and his testimony concerning the purpose for which he gave monies to the Petitioners was obviously crucial to the LOST TRUST defendants.[1] The Court of Appeals

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[1]In *McCormick v. United States*, 500 U.S. 257, 272 (1991), this Court stressed that care must be taken in applying the Hobbs Act legislators, noting that legislators are involved simultaneously in serving constituents and raising funds for campaigns. It is "unrealistic" to believe that Congress

itself recognized in an earlier opinion that "Cobb was the cornerstone of the prosecution's case and his credibility was the paramount issue at trial." *United States v. Taylor*, 966 F.2d 830, 837 (4th Cir. 1992), *aff'd on reh'g*, 993 F.2d 382 (4th Cir.), *cert. denied*, 510 U.S. 891 (1993). District Court Judge Hawkins was in the best position to determine whether the undisclosed evidence would have changed the result of the trials because it was he who presided over all those trials. His finding that the undisclosed evidence was material should not have been reversed by the Court of Appeals. *See United States v. Zagari*, 111 F.3d 307, 320 (2d Cir. 1997) (where a violation of *Brady* is alleged, "the trial judge's conclusion as to the effect of nondisclosure on the outcome of the trial is entitled to great weight").

3. ***Visit to Smith***: District Judge Hawkins also found that Cobb and Special Agent Clemens committed perjury during a hearing concerning misconduct arising from a visit by Cobb and Clemens to the residence of Steven Smith, a confidante of Senator Lindsay. Cobb and Clemens testified at the hearing that the purpose of their visit was merely to alert Lindsay by telephone that Lindsay's name would come up during Cobb's impending testimony. (A-150, -154.) But Smith later testified in appeal bond proceedings and at a hearing on the motions to dismiss that the purpose of Cobb's and Clemens's visit was to determine whether Cobb should characterize money given to Lindsay as an attorney's fee, and that the United States Attorney had authorized Cobb to so characterize the payoff. (A-148, -149.) Cobb also testified on the motions to dismiss that the United States Attorney had indicated that Cobb could characterize the payment as a legal fee. (A-152, -153.) District Judge Hawkins

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intended that legislators be found guilty of a federal crime when they act for the benefit of constituents or support legislation shortly after soliciting or receiving contributions from persons benefitted by the legislation. "To hold otherwise would open to prosecution not only conduct that has long been thought to be well within the law but also conduct that in a very real sense is unavoidable so long as election campaigns are financed by private contributions or expenditures, as they have been from the beginning of the Nation." *Id.* Thus, evidence bearing upon the credibility of Cobb's characterization of the money given the Petitioners was critical and plainly material.

concluded from this testimony, from the circumstances of the visit, and from Cobb's and Clemens's explanation that neither Cobb nor Clemens testified truthfully. (A-150.)

The Court of Appeals' decision that there was no evidence of misconduct by the government (A-57, -58) simply ignores the fact that District Judge Hawkins found that Clemens was not truthful in his initial testimony on the incident. The conclusion on appeal that "there is clearly insufficient evidence from which to infer a purpose for Cobb's telephone call to Lindsay other than that to which Cobb and Clemens initially testified" (A-57) ignores the testimony of both Smith and Cobb in 1995 as well as the overall circumstances.

4. ***Perjury of Greer***: District Judge Hawkins also found that the United States Attorneys involved in the LOST TRUST prosecutions had knowingly allowed Richard Greer, former Chairman of the South Carolina Development Board who cooperated with the government as part of a plea agreement, to commit perjury before the grand jury. Greer testified before a grand jury that he was unaware of any money being paid to state legislators to influence capital gains tax legislation. (A-138, -180.) District Judge Hawkins presided over Greer's subsequent sentencing where, in order to obtain a departure for Greer, the government represented that Greer had been instrumental in identifying which legislators were involved in accepting bribes in connection with the tax law changes, including Lindsay, and that Greer stood ready to testify against those legislators. Based upon the conflict between this representation and the grand jury testimony, District Judge Hawkins found that Greer committed perjury and that the government allowed this perjury to stand. (A-137, -138, -181.)

Reversing this finding, the Court of Appeals chose to accept the "play with semantics" which had been rejected by District Judge Hawkins, holding that Greer did not commit perjury because the question asked him before the grand jury was "[w]ere you aware" of payoffs, not "are you aware" of payoffs; because the question was not asked in the present tense, the Court of Appeals concluded that Greer must have been referring to his knowledge in 1988. (A-67.) The Court of Appeals cited no evidence showing that Greer was referring to his knowledge in 1988; it simply chose to construe the

evidence that way. Again, the appellate court did not review this finding with due deference to the District Court.

The Court of Appeals' decision wholly discounted this perjury and other misconduct in the investigation of bribery with respect to capital gains legislation (A-58, -59) because it failed to appreciate that these investigations were intimately connected. Each stemmed from Cobb's relationship with legislators and dealt with allegations of bribery. Evidence relating to the capital gains investigation showed that Cobb and the government arbitrarily considered certain money transfers to be bribes. District Judge Hawkins was immersed in the facts of these investigations and recognized the significance of the capital gains investigation. (A-134, -135, -181.)

The District Court's findings were certainly supported by evidence of record, and the Court of Appeals' decision does not demonstrate otherwise. The Court of Appeals' decision to reverse the findings reflects simply its decision to interpret the evidence differently and to come to different conclusions. This is not a valid basis for reversing a district court's finding under this Court's controlling precedent. If a district court's finding is plausible, the court of appeals may not reverse it even though convinced that it would have decided the matter differently. *Amadeo*, 486 U.S. at 223. "Where there are two permissible views of the evidence, the factfinder's choice between them cannot be clearly erroneous." *Anderson*, 470 U.S. at 574.

The District Court's findings are supported by the evidence it heard over the eight years that it presided over the LOST TRUST proceedings. Those findings were carefully explained by the District Court and should have been accepted by the Court of Appeals. The Court of Appeals' decision to reject all the District Court's findings was itself clearly erroneous and should be reversed by this Court.

II. DISMISSAL OF THE INDICTMENTS WAS A PROPER REMEDY IN RESPONSE TO THE PATTERN OF EGREGIOUS GOVERNMENTAL MISCONDUCT FOUND BY THE DISTRICT COURT.

The Court of Appeals avoided deciding the legal question of whether the pattern of governmental and prosecutorial misconduct found by the District Court justified dismissing the indictments by deciding to reverse the District Court's findings. (A-21.) Because those findings are not clearly erroneous and should be upheld, the question of whether dismissal of the indictments was warranted by the pattern of prosecutorial misconduct identified by the District Court must be addressed.

Although this Court has on occasion found that dismissal of an indictment was an inappropriate response to prosecutorial misconduct in a particular case, it has indicated that a showing of systematic abuses by prosecutors can justify the dismissal of criminal charges. In *United States v. Morrison*, 449 U.S. 361 (1981), this Court ruled that dismissal of an indictment was an inappropriate response to a violation of the defendant's Sixth Amendment rights by government agents because there was no demonstrable prejudice to the defendant. The decision noted, however, that "the record before us does not reveal a pattern of recurring violations by investigative officers that might warrant the imposition of a more extreme remedy in order to deter further lawlessness." *Id.* at 365 n.2.

The situation of recurring government misconduct also was mentioned in *Bank of Nova Scotia v. United States*, 487 U.S. 250 (1988), where this Court held that it was not appropriate to dismiss an indictment for violations of rules governing grand jury proceedings where it was not shown that the independence of the grand jury was affected by the misconduct. But the decision also noted "that we are not faced with a history of prosecutorial misconduct, spanning several cases, that is so systematic and pervasive as to raise a substantial and serious question about the fundamental fairness of the process which resulted in the indictment." *Id.* at 259. This decision and *Morrison* indicate that a court's supervisory power includes the power to dismiss an

indictment where, as the District Court found in this case, a pattern of prosecutorial misconduct exists.

Indeed, use of the supervisory power where recurring prosecutorial misconduct is found is fully consistent with the purposes for which that power exists. "The purposes underlying the use of the supervisory powers are threefold: to implement a remedy for violations of recognized rights, . . . to preserve judicial integrity by ensuring that a conviction rests upon appropriate considerations before the jury, . . . and finally, as a remedy designed to deter illegal conduct." *United States v. Hasting*, 461 U.S. 499, 505 (1983) (citations omitted). "The power has been applied not only to improve the truth-finding process of the trial, . . . but also to prevent parties from reaping benefit or incurring harm from violations of substantive or procedural rules (imposed by the Constitution or laws) governing matters apart from the trial itself." *United States v. Williams*, 504 U.S. 36, 46 (1992) (citations omitted).

The District Court's decision to dismiss the indictments here was based upon repeated and flagrant violations of the Petitioners' as well as other defendants' established constitutional right to government disclosure of evidence favorable to the Petitioners in accordance with *Brady* and *Giglio*. The District Court also found that prosecutors had violated their obligation under the Fifth Amendment not to knowingly allow perjured testimony to be presented in court, *Napue v. Illinois*, 360 U.S. 264, 269 (1959), and that the prosecutors themselves had made misrepresentations to the Court throughout the proceedings.

Dismissal of the indictments in response to the pattern of misconduct found by the District Court was appropriate in order to deter future misconduct by prosecutors before the District Court and to preserve judicial integrity. The District Court pointed out it had repeatedly admonished the government that it should disclose to the Petitioners and other defendants all the information to which they were entitled under *Brady*, and warned the government that it would take appropriate steps available to the Court if the government was not being candid and forthright. (A-132, -133, -178, -181, -182.) When it turned out that the government had misrepresented facts to the District Court and concealed *Brady* materials, the District Court

determined that the government had committed "fraud on the Court" (A-176), and it was required to take steps commensurate with the misconduct. As the District Court stated:

> There is no way to avoid the conclusion that the various and repeated acts of the government were simply wrong; that the government acted in bad faith, and its misconduct is not only greatly offensive to this court, but has interfered with this court's duty to insure the proper administration of justice.

(A-182.) It is obvious that the District Court's admonitions to the government agents and prosecutors were not sufficient to compel them to comply with their constitutional obligations. Thus, the District Court surely was warranted in dismissing the indictments in order to demonstrate that the kind of misconduct perpetrated by the government in these cases would not be tolerated and to deter similar misconduct from recurring.

Dismissal of the indictments also was appropriate to prevent the government from reaping any benefit from its misconduct. *Williams*, 504 U.S. at 46. In concealing impeaching and exculpatory information from the defendants and allowing false evidence to stand in court, the prosecutors made the calculated decision that the *Brady* material and true facts would not be discovered and that any convictions of the Petitioners would stand. To allow the government a second opportunity to prosecute the defendants after the illegal conduct has been discovered does not punish or redress that misconduct. In fact, the government now has a chance to use the first prosecutions as "dress rehearsals," contrary to established standards of fairness. *See Tibbs v. Florida*, 457 U.S. 31, 41 (1982) (double jeopardy prohibition prevents the government from honing its trial strategies and perfecting its evidence through successive attempts at conviction).

Given the magnitude and frequency of the government misconduct found by the District Court, this case certainly is one where dismissal is appropriate under the supervisory power because of systematic misconduct as contemplated by the decisions in

Morrison and *Bank of Nova Scotia*. A demonstrated pattern of misconduct affects the degree to which misconduct is "attenuated" and isolated and so affects the remedy authorized and appropriate under a court's supervisory power. *Hasting*, 461 U.S. at 506. The statement in *Morrison*, 449 U.S. at 365 n.2, that an extreme remedy might be warranted where the evidence reveals a pattern of recurring misconduct in order to deter future lawlessness simply states the obvious: A pattern of illegal conduct indicates an unwillingness on the part of the government to conform to legal norms and a need for a more severe response than mere public approbation. The District Court here found the government's misconduct to be "repetitious, flagrant and longstanding" (A-175), and so was the kind contemplated by this Court in *Morrison*.

While the Court of Appeals placed great reliance on *Hasting* in vacating the dismissal order, *Hasting* is distinguishable because the basis for this Court's ruling that the supervisory power could not be used to reverse a conviction and order a new trial was the concern for the trauma the victims of the crimes would experience in a new trial. *Hasting*, 461 U.S. at 507. This Court ruled that the lower court "failed to strike the balance between disciplining the prosecutor on the one hand, and the interest in the prompt administration of justice and the interests of the victims on the other." *Id.* at 509 (footnote omitted). No similar countervailing interests are involved in the instant case which would make the balance struck by the District Court's order of dismissal improper.

Although the Court of Appeals rejected the authority cited by the District Court as support for dismissing the indictments, it did so in a conclusory manner and without any real consideration of the force of those cases. For example, the Court of Appeals stressed that some of the cases cited by the District Court predated *Hasting* or *Bank of Nova Scotia*. (A-18.) But neither of those decisions eliminated the possibility that a pattern of illegal conduct could be the basis for dismissing an indictment. Indeed, in both *United States v. Omni International Corp.*, 634 F. Supp. 1414, 1436 (D. Md. 1986), and *United States v. Hogan*, 712 F.2d 757, 762 (2d Cir. 1983), the courts specifically cited *Hasting* and stated that *Hasting* did not preclude dismissal of an indictment in response to a pattern of prosecutorial misconduct. Those decisions also held that repeated

instances of misconduct affect the magnitude and seriousness of the offense against the law and justice and so justify a serious form of relief. *Omni International*, 634 F. Supp. at 1438; *Hogan*, 712 F.2d at 761-62.

The Court of Appeals' decision here conflicts with a decision of the Ninth Circuit Court of Appeals in *United States v. Kojayan*, 8 F.3d 1315 (9th Cir. 1993), which held that even a single instance of prosecutorial misconduct can justify dismissing an indictment if that misconduct is serious. In *Kojayan*, the appellate court caught prosecutors in a violation of their duty under *Brady* and in making a false statement to the jury. Reversing the defendants' convictions, the court held that simply ordering a retrial may not afford the defendant sufficient relief because it was important to assure that the misconduct would not be repeated in other cases. *Id.* at 1324. Noting that prosecutors have an overriding obligation to see that justice is served and that the misconduct could not be deemed harmless because it contaminated the trial, the court held that "[i]n a situation like this, the judiciary—*especially the court before which the primary misbehavior took place*—may exercise its supervisory power to make it clear that the misconduct was serious, that the government's unwillingness to own up to it was more serious still and that steps must be taken to avoid a recurrence of this chain of events." *Id.* at 1324-25 (emphasis added). It remanded with instructions for the district court to determine whether dismissal of the indictment with prejudice was appropriate. *Id.* at 1325.

The Court of Appeals' decision in the instant case conflicts with *Kojayan* because the Court of Appeals here refused to recognize any basis for dismissing an indictment under the supervisory power, absent prejudice, regardless of the seriousness of the prosecutorial misconduct. The Court of Appeals' only response to *Kojayan* was to point out that the Ninth Circuit did not cite to either *Hasting* or *Bank of Nova Scotia*. (A-18.) However, the Ninth Circuit did cite to *Williams*, 504 U.S. at 46-47, which was this Court's most recent statement on the criteria for use of the supervisory power at the time *Kojayan* was decided. *Kojayan*, 8 F.3d at 1325. Therefore, *Kojayan* certainly is not distinguishable on the basis that it wholly failed to consider the factors which might justify dismissal of an indictment under the supervisory power.

Kojayan correctly recognized, as did the District Court in this case, that serious prosecutorial misconduct warrants dismissing an indictment under the supervisory power.

Indeed, the remedy of dismissal must be available to trial courts in cases like the instant one in order that government prosecutors have some incentive to comply with their obligations under *Brady*. The bulk of the governmental misconduct found by the District Court here involved violations of the disclosure requirements of *Brady*, as well as the knowing use of perjured testimony by the government. (A-178, -180, -181.) The District Court's opinion pointed out that the government repeatedly represented to the Petitioners and the District Court that all the materials requested by the Petitioners or which otherwise had to be disclosed under *Brady* had been disclosed, and the District Court noted at the time of these representations that the Court and the defendants must "take [the prosecutors] at their word." (A-133.) The District Court rightly characterized as most "offensive" "the continual misrepresentations made to the court that all discovery to which the defendants were entitled had been turned over to them," and it stated that the repeated false assertions of full disclosure "rises to the level of outrageous conduct." (A-177, -178.)

Dismissal of the indictments was particularly appropriate in light of these findings because the proper functioning of the *Brady* rule and the right of a defendant to a fair trial, which are the goals of the *Brady* rule, depend largely upon the good faith of the government and the prosecutor. This Court noted as much in *Kyles v. Whitley*, 514 U.S. 419 (1995), stating as follows:

> While the definition of *Bagley* materiality in terms of the cumulative effect of suppression must accordingly be seen as leaving the government with a degree of discretion, it must also be understood as imposing a corresponding burden. On the one side, showing that the prosecution knew of an item of favorable evidence unknown to the defense does not amount to a *Brady* violation without more. *But the prosecution, which alone can know what is undisclosed, must be assigned the consequent*

> *responsibility to gauge the likely net effect of all such evidence and make disclosure when the point of "reasonable probability" is reached.* This in turn means that the individual prosecutor has a duty to learn of any favorable evidence known to the others acting on the government's behalf in the case, including the police. But whether the prosecutor succeeds or fails in meeting this obligation, . . . the prosecution's responsibility for failing to disclose known, favorable evidence rising to a material level of importance is inescapable.

Id. at 437-38 (emphasis added). This Court went on to point out that "the prosecution cannot be subject to any disclosure requirement without at some point having the responsibility to determine when it must act," and that a prosecutor must act in a manner which "will serve to justify trust in the prosecutor as 'the representative . . . of a sovereignty . . . whose interest . . . in a criminal prosecution is not that it shall win a case, but that justice shall be done.'" *Id.* at 439 (quoting *Berger v. United States*, 295 U.S. 78, 88 (1935)). *Kyles* recognized that the rules requiring disclosure of evidence by the government are to a large extent dependent upon the integrity of the prosecutor, who alone may have the power of determining whether evidence needed by the defendant comes to light such that a fair trial is afforded the defendant.

It is precisely because the prosecutor alone can determine whether *Brady* material ever is disclosed or, for that matter, whether the existence of perjured testimony is revealed, that a trial court must be able to exercise its supervisory power to dismiss a charge when there is a finding of pervasive and egregious violations of *Brady*. Without the threat of the sanction of dismissal, an unethical prosecutor has little or no incentive to see to it that the duties of disclosure are followed in the first instance and that a defendant obtains a fair trial the first time. Faced with the choice of either disclosing evidence which may impair the chances of obtaining a conviction or concealing that evidence, a prosecutor has little impetus to reveal the evidence if he or she knows that the worst that will happen if the nondisclosure somehow comes to light later is that

the defendant will receive a new trial and that there will be a second chance to convict the defendant.

Allowing the government to make repeated attempts at obtaining a conviction where its own egregious misconduct creates the necessity for a new trial is contrary to constitutional principles:

> "[T]he State with all its resources and power should not be allowed to make repeated attempts to convict an individual for an alleged offense, thereby subjecting him to embarrassment, expense and ordeal and compelling him to live in a continuing state of anxiety and insecurity, as well as enhancing the possibility that even though innocent he may be found guilty."

United States v. Dinitz, 424 U.S. 600, 606 (1976) (quoting *Green v. United States*, 355 U.S. 184, 187-88 (1957)). A trial court must have the ability to prevent this kind of harm when it finds that the government has engaged in a pattern of intentionally failing to disclose evidence it was obligated to disclose and allowing false testimony to be presented. Without the threat of this power, a prosecutor may choose to take the chance that evidence unfavorable to the government will not come to light, knowing that there will still be other chances to convict the defendant if the evidence is discovered. The supervisory power must embrace the ability of a trial court to prevent the government from making repeated attempts to convict a defendant where it is the government's own outrageous behavior which deprived the defendant of a fair trial, and the possibility of acquittal, in the first instance.

Even apart from the authority to dismiss an indictment on the basis of a demonstrable pattern of illegal conduct, as indicated in *Morrison* and *Bank of Nova Scotia*, the District Court's decision to dismiss the indictments is supportable because it cannot be said that the Petitioners were not prejudiced or harmed by the government's misconduct. The Court of Appeals stated that "any prejudice that arguably existed as a consequence of discovery violations is fully remedied by this court's orders of new trials." (A-19.) Its apparent reasoning here is that because the Petitioners can

receive a second "fair trial" at which all the evidence hidden from them in the course of the first trials will be available to them and all perjury committed at the first trials will be purged, the Petitioners are not "prejudiced."

While it may be that there is no "prejudice" to the Petitioners in the sense that a second trial will presumably be "fair" and free of the misconduct which affected the first trials, this does not mean that the Petitioners have not been "prejudiced" in the sense that they have been harmed by the governmental misconduct. In this case, the governmental misconduct would have required a reversal of the results of the first trials and would have caused the Petitioners to be tried a second time.[2] A defendant clearly has a "'valued right to have his trial completed by a particular tribunal,'" and should not be required to face repeated governmental attempts to convict him. *Arizona v. Washington*, 434 U.S. 497, 503 (1978) (quoting *Wade v. Hunter*, 336 U.S. 684, 689 (1949)). As explained by this Court:

> The reasons why this "valued right" merits constitutional protection are worthy of repetition. Even if the first trial is not completed, a second prosecution may be grossly unfair. It increases the financial and emotional burden on the accused, prolongs the period in which he is stigmatized by an unresolved accusation of wrongdoing, and may even enhance the risk that an innocent defendant may be convicted. The danger of such unfairness to the defendant exists whenever a trial is aborted

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[2] Although the convictions obtained in the first trials were reversed because of improper jury instructions or the improper admission of evidence, and not because of the governmental misconduct, this fact should not absolve the government of the harm caused the Petitioners by its misconduct. Had the exculpatory evidence been disclosed to the Petitioners and had the government not made knowing use of perjured testimony, the Petitioners might have been acquitted. The government, by its intentional misconduct, deprived the Petitioners of a fair trial in the first instance. That the convictions were reversed because of some other trial error should not be a basis for a contention that the Petitioners were not harmed by the misconduct, especially where it is possible that the defendants would have been acquitted absent the misconduct.

> before it is completed. *Consequently, as a general rule, the prosecutor is entitled to one, and only one, opportunity to require an accused to stand trial.*

Arizona, 434 U.S. at 504-05 (footnotes omitted; emphasis added).

Thus, it is incorrect to say that a defendant is not "prejudiced" when he or she is required to face a second prosecution because of governmental misconduct. A defendant, through no fault of his or her own, is subjected to the emotional and financial costs of a second prosecution and the continuing taint on his or her reputation arising from the mere existence of the criminal charges. While a second trial might be fair and free from prejudice,[3] it ignores reality to say that a defendant is not harmed by the requirement of undergoing a second trial. Where this harm may be attributed to the misbehavior of the government, there must be some meaningful remedy available to rectify that harm.

The instant case involves the kind of harm and prejudice to the Petitioners which makes it wholly distinguishable from the cases relied upon by the Court of Appeals for its determination that the Petitioners were not prejudiced or harmed by the governmental misconduct. In *Hasting*, 461 U.S. at 511, this Court could say on the basis of the overwhelming evidence against the defendants that the misconduct of the prosecutor was harmless and did not affect the jury's guilty verdict. *Hasting* ruled that the supervisory power should not be invoked "when there is no 'reasonable possibility that the [practice] complained of might have contributed to the conviction.'" *Id.* at 506 (quoting *Fahy v. Connecticut*, 375 U.S. 85, 86-87 (1963). By contrast, it cannot be said in this case that the defendants would have been convicted had the *Brady* materials

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[3] Indeed, it can be forcefully argued that a defendant's right to a fair trial is unfairly prejudiced when he or she is required to face a second prosecution as a result of governmental misconduct. This Court has recognized the financial burden resulting from a second trial, *id.* at 503, and, to the extent this financial burden inhibits a defendant from either hiring the counsel of his or her choice or obtaining pretrial services helpful to his or her defense, there is the kind of prejudice the government asserts must exist to justify dismissal of an indictment.

withheld by the government been disclosed and the jury allowed to consider those materials. Unlike *Hasting,* the instant case is one where the defendants and the jury were deprived of relevant evidence as a result of prosecutorial misconduct.

The situation involved in *Bank of Nova Scotia* also is distinguishable because, again, it could be said upon examination of the prosecutorial misconduct that it did not affect the independence of the grand jury, especially because much of the prosecutorial misconduct occurred after the grand jury returned the indictment. 487 U.S. at 258. Furthermore, other instances of governmental misconduct in that case involved violations of rules, such as those preserving the secrecy of grand jury proceedings, which serve policies other than assuring that a person is charged and convicted upon sufficient proof of guilt. *Id.* at 259-60. Finally, *Bank of Nova Scotia* involved a case where dismissal was sought on the basis of nonconstitutional and nonfundamental errors, and the standard of prejudice applied in that case was expressly limited to those kinds of errors. *Id.* at 256-57. The instant case involves errors of constitutional dimensions and the violation of rules intended to assure that criminal defendants are convicted in a fair trial where the relevant evidence bearing upon guilt is presented. Unlike *Bank of Nova Scotia,* it cannot be said that the defendants here would not have been acquitted and protected from another prosecution had they not been victims of the prosecutorial misconduct.

The result in *Morrison,* 449 U.S. at 366-67, also is not dispositive here because it was clear in that case that the defendant's trial on the charges was not affected by the violation of her Sixth Amendment right: The government obtained no evidence as a result of the interference with the attorney-client relationship and that relationship had not suffered whatsoever. The case of *United States v. Payner*, 447 U.S. 727 (1980), relied on by the Court of Appeals, also is distinguishable because it involved a defendant's attempt to apply the exclusionary rule based upon a violation of a third-party's Fourth Amendment rights. Thus, not only was the defendant in *Payner* requesting relief where his own rights were not violated, but the relief requested would deprive the jury of relevant evidence in determining guilt or innocence. The instant case involves a situation where the misconduct affected the defendants' personally held

constitutional rights, and the remedy the District Court imposed vindicated the right of the Petitioners, the court, the jury, and the public to have all relevant and competent evidence presented to the jury.

This case is wholly different from any case relied upon by the Court of Appeals in vacating the District Court's order of dismissal. The pattern and nature of the prosecutorial misconduct the District Court found is itself a sufficient basis for dismissal of the indictments in the interest of deterring future misconduct and to assure that the government does not profit from that misconduct. Additionally, this is not a case where it is clear that the defendants suffered no harm or prejudice as a result of the misconduct. They were deprived of their right to a fair trial because of intentional and repeated violations of their constitutional rights by government agents. If the Court of Appeals' decision is allowed to stand, the defendants will be forced to endure another trial on the same charges even though they could well have been acquitted had the government not willfully hid material and exculpatory evidence from them, misrepresented important facts to the court, and allowed perjured testimony to be presented in court. Where such governmental misconduct deprives criminal defendants of the right to a fair trial in the first instance, the remedy of dismissal of the charges should be available in order to deter similar misconduct and to assure that the government abides by its obligation to make relevant exculpatory evidence available to a defendant in the first instance. In light of the repeated and egregious nature of the misconduct found by the District Court, its order dismissing the charges against the defendants should not have been vacated by the Court of Appeals.

CONCLUSION

Justice Frankfurter, quoting *Nardone v. United States*, 308 U.S. 338, 342 (1939), described the purpose and necessity of the judiciary's supervisory power in *McNabb v. United States*, 318 U.S. 332, 342 (1943), as follows:

> The civilized conduct of criminal trials cannot be confined within mechanical rules. It necessarily demands the authority of limited direction entrusted

> to the judge presiding in federal trials, including a well established range of judicial discretion, subject to appropriate review on appeal, and ruling upon preliminary questions of fact. Such a system as ours must, within the limits here indicated, rely on the learning, good sense, fairness and courage of federal trial judges.

District Court Judge Hawkins, exercising the discretion committed to him and the good sense obtained after presiding over proceedings connected with the OPERATION LOST TRUST prosecutions for eight years, found that the government had engaged in systematic misconduct which warranted the dismissal of the indictments.

The Court of Appeals' disregard of the conclusions reached by the District Court is supported neither by law, the record, nor reason. The District Court's findings were supported by substantial evidence and the Court of Appeals' decision fails to articulate sufficient reasons to label those findings "clearly erroneous." The District Court's decision to dismiss the indictments based upon the pattern of misconduct shown by the evidence also was a proper exercise of its supervisory power in order to deter similar misconduct, remedy the harm inflicted upon the Petitioners and to vindicate the integrity of the Court.

The Petitioners respectfully request that a writ of certiorari issue to the Court of Appeals for the Fourth Circuit in this case and that, after full briefing, this Court reverse the judgment of the Court of Appeals and reinstate the order of the District Court dismissing the indictments.

Respectfully submitted,

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Supreme Court, U.S.
FILED

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NO. _____

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1998

UNITED STATES OF AMERICA,
RESPONDENT,

v.

PAUL WAYNE DERRICK, LARRY BLANDING and
JEFFERSON MARION LONG JR.,
PETITIONERS.

On Petition for Writ of Certiorari to the
United States Court of Appeals
for the Fourth Circuit

APPENDIX

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UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

UNITED STATES OF AMERICA,
Plaintiff-Appellant,

v.

PAUL WAYNE DERRICK,
Defendant-Appellee.

No. 97-4230

DALE L. DUTREMBLE; E. BART DANIEL;
RICHARD GREER,
Amici Curiae,

and

CHARLESTON POST AND COURIER,
Movant.

UNITED STATES OF AMERICA,
Plaintiff-Appellant,

v.

JEFFERSON MARION LONG, JR., a/k/a Bud,
Defendant-Appellee.

No. 97-4231

DALE L. DUTREMBLE; E. BART DANIEL;
RICHARD GREER; ALVA TAYLOR BROWN,
Personal Representative of the Estate of
LUTHER LANGFORD TAYLOR;
NATIONAL ASSOCIATION OF CRIMINAL
DEFENSE LAWYERS,
Amici Curiae,

and

CHARLESTON POST AND COURIER,
Movant.

UNITED STATES OF AMERICA,
Plaintiff-Appellant,

v.

LARRY BLANDING,
Defendant-Appellee.

DALE L. DUTREMBLE; E. BART DANIEL; RICHARD GREER; ESTATE OF BENJAMIN J. GORDON, JR., a/k/a B. J. Gordon; ALVA TAYLOR BROWN, Personal Representative of the Estate of LUTHER LANGFORD TAYLOR; NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS,
Amici Curiae,

and

CHARLESTON POST AND COURIER,
Movant.

No. 97-4232

Appeals from the United States District Court
for the District of South Carolina, at Columbia.
Falcon B. Hawkins, Chief District Judge.
(CR-91-91-FBH, CR-91-384-FBH, CR-90-434-FBH)

Argued: May 7, 1998

Decided: November 23, 1998

Before WIDENER, NIEMEYER, and LUTTIG, Circuit Judges.

Vacated and remanded by published opinion. Judge Luttig wrote the opinion, in which Judges Widener and Niemeyer joined. Judge Widener wrote a separate concurring opinion.

COUNSEL

ARGUED: Elizabeth Dorsey Collery, Appellate Section, Criminal Division, UNITED STATES DEPARTMENT OF JUSTICE, Washington, D.C., for Appellant. Dale L. DuTremble, Charleston, South Carolina; Gedney Main Howe, III, Charleston, South Carolina, for Amici Curiae DuTremble, Daniel and Greer. Joel Wyman Collins, Jr., COLLINS & LACY, P.C., Columbia, South Carolina; Jack Bruce Swerling, Columbia, South Carolina, for Appellees. Marvin David Miller, Alexandria, Virginia; Lionel S. Lofton, Charleston, South Carolina; Joel W. Collins, Jr., COLLINS & LACY, P.C., Columbia, South Carolina, for Amici Curiae Association, Gordon, and Estate of Taylor.

ON BRIEF: John C. Keeney, Acting Assistant Attorney General, Criminal Division, UNITED STATES DEPARTMENT OF JUSTICE, Washington, D.C., for Appellant. James E. Bell, III, BELL & MOORE, Sumter, South Carolina, for Appellee Blanding. Lisa B. Kemler, ZWERLING & KEMLER, Alexandria, Virginia, for Amicus Curiae Association.

OPINION

LUTTIG, Circuit Judge:

Appellant, the United States of America, appeals from the order of the federal district court for the District of South Carolina, dismissing with prejudice five indictments returned in the aftermath of the so-called Operation Lost Trust investigation into political corruption in the South Carolina Statehouse in the early 1990s. For the reasons that follow, we vacate the opinion of the district court and remand with instructions that the dismissed indictments be reinstated.

I.

This case arises from an FBI investigation into political corruption in the South Carolina legislature in connection with its consideration in 1990 of the state's parimutuel betting legislation. That investigation resulted in the prosecution and conviction by jury of the defendants–Larry Blanding, Paul Wayne Derrick, and Jefferson Marion Long, Jr.[1]–for various offenses, including extortion under color of official right and conspiracy to commit extortion, in violation of the Hobbs Act, 18 U.S.C. § 1951. Defendants Blanding's and Derrick's convictions (as well as Taylor's and Gordon's) were eventually overturned by this court on appeal on the grounds that the intervening Supreme Court decisions in *McCormick v. United States*, 500 U.S. 257 (1992), and *Evans v. United States*, 504

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[1]Two other original defendant-appellees to this appeal, Luther Taylor and B.J. Gordon, are now deceased. Taylor passed away on March 23, 1997, and Gordon passed away on July 12, 1997. Consequently, neither of these individuals is a party to this appeal. By order of the court, however, we granted the estates of both of these defendants the opportunity to participate as *amicus curiae*.

U.S. 255 (1992), rendered defective the jury instructions that were given at their trials. *See United States v. Blanding*, 1992 WL 138353 (4th Cir. No. 91-5871); *United States v. Derrick*, 1994 WL 34691 (4th Cir. No. 92-5084). We affirmed the district court's award of a new trial to defendant Long based upon the improper playing of inadmissible tape recordings before his jury. *United States v. Long*, 1994 WL 56993 (4th Cir. No. 92-6799). Accordingly, all three cases were remanded to the district court for retrial.

Upon remand, defendant Taylor moved for dismissal of his superseding indictment, which had also included defendants Gordon and Blanding, on the grounds of discovery violations and other alleged prosecutorial misconduct. And in response to these allegations of improper withholding of documents and other wrongdoing, the government decided essentially to "start over on discovery by providing it again." *United States v. Taylor*, 956 F. Supp. 622, 626 n.4 (D.S.C. 1997) (district court order dismissing defendants' indictments) (quoting 10/18/94 OPR Report at 10). This decision having been made, the government produced to the defendants "all [FBI] 302s that mentioned any co-conspirator named in the new indictment as well as all pre-trial Jencks Act materials." J.A. at 2688. This production on November 29, 1993, prompted defendant Gordon also to move for the dismissal of his indictment on the grounds that the government had improperly withheld materials required to be produced under *Brady v. Maryland*, 373 U.S. 83 (1963).

On February 22, 1994, the district court granted the government's motion for continuance in order to allow the Department of Justice's Office of Professional Responsibility (OPR) to investigate the defendants' allegations of prosecutorial misconduct. That investigation, which disclosed no intentional misconduct by the prosecution in these cases, was concluded in October of 1994. Although the Department of Justice found that the prosecution had not engaged in any intentional

wrongdoing, the United States Attorney for South Carolina recused his office from further involvement, and attorneys from Public Integrity at Main Justice assumed responsibility for prosecution of the cases.

Thereafter, at an October 20, 1994, status conference, the government agreed to produce to the defendants all FBI 302s and transcripts in its possession relating to the investigation, reserving the right to seek *in camera* review by the court of any materials the government believed should not be produced. J.A. at 1334, 1341. The district court also ordered the government to produce any existing handwritten interview notes. J.A. at 1348. All of these materials were to be surrendered by December 1, 1994, into the evidence room established by the district court. J.A. at 1352-53 (district court discovery order). Pursuant to its promise at the status conference, the government placed a large number of documents in the evidence room. Additionally, acting upon its reservation of right, the government submitted a number of FBI 302s to the court for *in camera* inspection and argued that they should not be produced to the defendants.

In January and February of 1995, the prosecution learned that the FBI had in its possession tape recordings and FBI 302s relating to the 1988-89 drug investigations of prosecution witness Ron Cobb. Upon learning of these materials, the prosecution obtained these documents and turned them over to the defendants.

Following the above-described productions, the defendants proposed to the court at its April 19, 1995, hearing on pending discovery motions, that

> the government take every scrap of paper that they have, every internal memorandum, every piece of correspondence, every doodle pad,

> every videotape, every transcript, every audio tape, everything, put it in the room.

J.A. at 1364-65. (The same day, defendant Derrick filed a motion to dismiss his indictment.) And the following day, over the government's objections that it had already produced far more documents than required by *Brady* and federal rules, the district court issued an order "[t]o avoid any further confusion as to what material should and should not be turned over by the government to the . . . defendants." J.A. at 1418, 1419. That order required the government to produce for *in camera* inspection by May 8, 1995, "all documents and/or materials in [its] possession . . . dealing with these cases and not presently available to the defendants in the 'evidence room'." J.A. at 1420. In compliance with the court's order, the government produced, according to the district court, seven file boxes from the Department of Justice, four file boxes from the FBI, and one file box from the Office f Professional Responsibility. *See* J.A. at 1422.

In a July 25, 1995, discovery order entered following its *in camera* review of the materials produced pursuant to its earlier orders, the district court concluded that the government's argument that the drug-related audiotapes produced in March of 1995 were not relevant or discoverable under *Brady* was "ludicrous" because "the drug investigation was hand-in-glove with the corruption investigation known as Lost Trust." J.A. at 1427. Arguments such as the one made by the government, the district court said, "cause the court to look very closely at what was withheld by the government that may have jeopardized the rights of these defendants." J.A. at 1427. The court also concluded that documents relating to corruption in connection with the capital gains legislation (as opposed to the parimutuel betting legislation that was the subject of the Lost Trust sting operation) were relevant to the defendants' defense because "one of the key figures in the Lost Trust investigation pled to a RICO violation, one of the predicate offenses of which was the

taking of a bribe from the government's cooperating subject and key Lost Trust witness, Ron Cobb, in relation to the capital gains tax bill." J.A. at 1428.

As to the documents submitted by the government for *in camera* inspection, the district court concluded they were

> in the main, internal administrative documents constituting privileged work products, or are documents that are part of the public record in these cases, or are copies of documents known by this court to have been previously furnished to defendants. *The court has found few additional materials therein to which it believes these defendants are entitled under either Brady or within the meaning of the "open file policy" in effect in this district.*

J.A. at 1430 (emphasis added). The court ordered the government to produce but ten specific documents in addition to OPR interview notes. J.A. at 1440.

The district court subsequently amended its July 25 discovery order a number of times, including once on September 7, 1995. In its September 7 amended order, the court ordered "that should the government come into possession of any evidence which might impact on the alleged capital gains cover-up, such information and/or materials shall be immediately submitted to this court for *in camera* review." J.A. at 1457. In response to this amended order, the government inquired, J.A. at 1542, and was informed by the FBI that Special Agent Denton had located, "on the 14th floor of the Strom Thurmond Federal Building in a section of files known as closed files," J.A. at 1540, an investigative file for the capital

gains matter.[2] The government notified the court that it had found this file, placed some of the documents in the evidence room, and, on October 4, 1995, submitted other documents for *in camera* review by the court. In an order dated October 6, 1995, the district court indicated that the submitted documents "should have been furnished long ago" and, acknowledging that it had "made only a cursory *in camera* review of the documents," ordered them produced to the defendants. J.A. at 1460.

On October 18-20, 1995, the court conducted an evidentiary hearing on the defendants' claims of prosecutorial misconduct. During this hearing, which related primarily to the capital gains investigation, Special Agent Denton, after testifying that the FBI maintained "cooperating witness" files, was asked to search his files again for any files relating to Ron Cobb. In conducting this review, Denton found an FBI 302 on Robert Kohn, which was generated after the defendants' trials and which he produced to the defendants. Rejecting the defendants' suggestion that this document had been intentionally withheld, the district court stated:

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[2]Special Agent Denton testified:

> I noticed on one of the files a file number that was not the Lost Trust file, it was down at the bottom of an empty 302, and it had the Lost Trust file number on it and it had another file number.
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> . . .
>
> It turns out it was the capital gains file, which was not indexed capital gains.

J.A. at 1542.

> [O]ut of the thousands and thousands of documents that's passed through this court, I'm not surprised that there's one that got overlooked, or lost, or whatever it is. . . . Now, I had not seen that last 302 that was found, and I don't know if it contains anything that would warrant anybody trying to intentionally hide it. I have already heard the agent say that he didn't intentionally do it. He doesn't know how it got misplaced, but he found it, and he gave it up.
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> I guess he would have been better off if he had just acted like he didn't find it, but I think he's trying to comply with the court's orders, and there have been several of these things that have come up after a more thorough investigation.

J.A. at 1929.

At the conclusion of the hearing, the district court said that it wanted to re-review the boxes of documents that it had already reviewed *in camera* and had said in its July 25, 1995 order need not be produced. On February 6, 1996, the court ordered that all of these documents be produced to the defendants, reasoning that "little, if anything, contained therein can still be classified as 'sensitive'," "a wider latitude must be given with regard to materials to be furnished for the purposes of the defendants' pursuit of their motions to dismiss for prosecutorial misconduct than might be given for trial preparation," and that "no prejudice will inure to the government should this court order all of these documents furnished to the defendants." J.A. at 1946-47.

On October 3, 1996, the district court reconvened the hearing on defendants' motions to dismiss their indictments, and thereafter received additional briefing in support of and in

opposition to the motions to dismiss. And, on February 3, 1997, the district court entered its order dismissing the defendants' indictments with prejudice pursuant to its supervisory power.

Rejecting the government's contention that the dismissal of the indictments would be unauthorized absent a specific finding that the alleged prosecutorial misconduct prejudiced the defendants, the district court stated:

> The court is convinced that the totality of the government's actions in these matters rises to the level of egregious prosecutorial misconduct, and that this is a sufficient finding on which the court can exercise its supervisory power.
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> . . .
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> The government would argue that in using its supervisory power the court must find pattern and prejudice, and that the defendants have proven neither. The court agrees that the circuits are in disarray on this subject, but believes there is sufficient precedent to dismiss the subject indictments without addressing these issues.

956 F. Supp. at 623; *see also id.* (district court concluding that "it has the discretion under the doctrine of the court's supervisory power to dismiss should it find the government's actions so outrageous as to offend the sensibilities of the court").[3] From the district court's order dismissing the

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[3]The district court summarized its beliefs as to the prosecution's misconduct as follows:

defendants' indictments pursuant to its supervisory power, the United States appealed.[4]

> The court is convinced that this investigation began in an appropriate fashion. It is, after all, the responsibility of the FBI and the USAO to pursue information with regard to illegal acts within their jurisdiction. It is the opinion of the court, however, that some of the investigators and lead prosecutors got lost on their way to the lofty goal of weeding out drugs and corruption from the South Carolina State House. Overzealousness and political pressure upon those in positions of authority appear to be the detours that led the government to rush to trial, especially in the cases of Taylor, Blanding and Gordon; to withhold volumes of exculpatory evidence; to allow perjured testimony to stand uncorrected on more than one occasion; to allow its primary cooperating witness, Cobb, to take an unusual amount of control of the sting operation; to go outside of its own regulations to target certain legislators, and to mislead this court to such an extent as to perpetrate a fraud upon the court.

956 F. Supp. at 658.

[4]By orders of this court, former prosecutors E. Bart Daniel and Dale L. DuTremble, joined by Richard Greer, were permitted to participate in this appeal as *amicus curiae*, as were the estates of Luther Taylor and Benjamin Gordon. The brief filed by Daniel, DuTremble, and Greer will be referred to throughout as the brief of the "prosecutors *amici*."

II.

As the United States vigorously asserts, the district court's dismissal of the defendants' indictments without a finding of prejudice is directly contrary not only to the precedent of this court, but also to clear and well-established Supreme Court precedent. As the Supreme Court held in *United States v. Hasting*, 461 U.S. 499 (1983), a court's "supervisory powers to discipline the prosecutors of its jurisdiction" may not be invoked to reverse a defendant's conviction for prosecutorial misconduct where the alleged misconduct was harmless. *Id.* at 505. In *Hasting*, the Seventh Circuit had,"notwithstanding the harmless nature of the error," id. at 504, reversed the defendants' convictions because the prosecutor had commented on the defendants' failure to testify in violation of *Griffin v. California*, 380 U.S. 609 (1965). The Court of Appeals had, through its reversal of the convictions, sought "to discipline the prosecutor–and warn other prosecutors–for what it perceived to be continuing violations of *Griffin*" within the circuit. *Hasting*, 461 U.S. at 504. The Supreme Court, however, reversed, holding that a court's supervisory powers may not be invoked to evade the harmless error rule for constitutional violations[5] because "the interests preserved by the doctrine of harmless error"–including the interest of the victims in seeing the defendants brought to justice and the public's interest in the "prompt administration of justice"–"cannot be so lightly and casually ignored in order to chastise what the court viewed as prosecutorial overreaching." *Hasting*, 461 U.S. at 507, 509, 505. The Court reasoned that invocation of the "[s]upervisory power to reverse a conviction is not needed as a remedy when the error to which it is addressed is harmless since by definition, the conviction would have been obtained notwithstanding the asserted error." *Id.* at 506. The Court also noted that concern for "the integrity of the

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[5]*See Chapman v. California*, 386 U.S. 18 (1967).

process carries less weight" when the error is harmless because there is "no 'reasonable possibility' that [it] contributed to the conviction." *Id.* (quoting *Fahy v. Connecticut*, 375 U.S. 84, 86-87 (1963)). Finally, the Court explained, "deterrence is an inappropriate basis for reversal where, as here, [the constitutional violation is at best "attenuated"] and where means more narrowly tailored to deter objectionable prosecutorial conduct are available."[6] *Id.* (footnotes omitted).

It would seem to follow, *a fortiori*, from the Court's holding in *Hasting* that a court may not, without finding prejudice to the defendant, exercise its supervisory power to reverse a defendant's conviction and require a retrial based upon prosecutorial misconduct, that a court may not dismiss an indictment altogether on this ground without also finding prejudice. The dismissal of an indictment altogether clearly thwarts the public's interest in the enforcement of its criminal laws in an even more profound and lasting way than the requirement of a retrial. And, indeed, in *Bank of Nova Scotia v. United States*, 487 U.S. 250 (1988), the Court reaffirmed its analysis in *Hasting* and squarely held that a court has "no authority to dismiss the indictment on the basis of prosecutorial misconduct absent a finding that petitioners were prejudiced by such misconduct." *Id.* at 263.

Defendants apparently contend that the Court's holding in *Nova Scotia* applies only to prosecutorial misconduct that

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[6]The Court noted that more narrowly tailored means of deterrence included "order[ing] the prosecutor to show cause why he should not be disciplined," "asking the Department of Justice to initiate a disciplinary proceeding against him," or "publically chastis[ing] the prosecutor by identifying him in its opinion." *Hasting*, 461 U.S. at 506 n.5.

occurs at the grand jury stage.[7] *See* Appellee's Br. at 93. However, although the misconduct at issue in *Nova Scotia* did occur before the grand jury, *see id.* at 254 ("[A]s a general matter, a district court may not dismiss an indictment for [prosecutorial misconduct] in grand jury proceedings unless such errors prejudiced the defendants."), both the Court's analysis and the text of its opinion confirm that *Nova Scotia's* holding applies equally to prosecutorial misconduct that occurs at the pre-trial and trial stages of a prosecution.

Specifically, the Court reasoned that all federal courts are bound by Federal Rule of Criminal Procedure 52(a) to conduct the harmless-error inquiry and that a "court may not invoke supervisory power to circumvent" that inquiry. *Id.* at 254-55. As the Court explained, "[t]he balance struck by [Rule 52(a)] between societal costs and the rights of the accused may not casually be overlooked 'because a court has elected to analyze the question under the supervisory power.'" *Id.* at 255 (quoting *United States v. Payner*, 447 U.S. 727, 736 (1990)). Thus, the Court held broadly that "a district court exceeds its powers in dismissing an indictment for prosecutorial misconduct not prejudicial to the defendant," *Nova Scotia*, 487 U.S. at 255.

Other Supreme Court cases likewise confirm that a court's supervisory power cannot be exercised to dismiss indictments for government misconduct absent a showing of prejudice to the defendants. *See, e.g., United States v. Morrison*, 449 U.S. 361, 365-67 (1981) (holding that dismissal of an indictment was an inappropriate remedy for an alleged Sixth Amendment violation that did not prejudice the defendant, even though the conduct of the government agents

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[7]The district court in this case made no findings of prosecutorial misconduct before the indicting grand jury. *See* Appellees' Brief at 93.

was "egregious"); *id.* at 365 ("[A]bsent demonstrable prejudice or substantial threat thereof, dismissal of the indictment is plainly inappropriate, even though the violation may have been deliberate." (footnote omitted)); *cf. United States v. Payner*, 447 U.S. 727, 733 (1980) (holding that district court cannot invoke its supervisory power to circumvent the Fourth Amendment standing rules by excluding evidence seized illegally and in bad faith by the government in violation of a third party's–but not the defendant's–constitutional rights).

We, too, have consistently recognized that an indictment may not be dismissed for prosecutorial misconduct absent a showing that the misconduct prejudiced the defendant. *See, e.g., United States v. McDonald*, 61 F.3d 248, 253 (4th Cir. 1995) (holding that indictment should not be dismissed for alleged prosecutorial misconduct before the grand jury that did not prejudice the defendant because "[t]he United States Supreme Court has recognized . . . that an indictment may be quashed on the basis of prosecutorial misconduct, but only where the government's misdeeds 'substantially influenced the grand jury's decision to indict, or if there is grave doubt that the decision to indict was free from the substantial influence of such violations'" (quoting *Nova Scotia*, 487 U.S. at 256) (internal quotation marks omitted)); *United States v. Lee*, 906 F.2d 117, 120 (4th Cir. 1990) ("[T]he district court erred in dismissing the indictment [based on the prosecution's failure to produce a defense witness, who was allegedly "within government control,"] because, as the Supreme Court has explained, 'absent demonstrable prejudice, or substantial threat thereof, dismissal of the indictment is plainly inappropriate, even though the violation may have been deliberate.'" (quoting *Morrison*, 449 U.S. at 365; citing *Nova Scotia*, 487 U.S. at 254)); *United States v. Hastings*, 126 F.3d 310, 317 (1997) (holding that, although the government's improper refusal to comply with a discovery order warranted sanctions, dismissal of the indictment was"an extreme and inappropriate sanction"

where the only prejudice to defendant was "inconvenience and slight expense of delays").

And virtually every other circuit to consider the issue post-*Hasting* and *Nova Scotia* has also held that an indictment may not be dismissed based on prosecutorial misconduct, absent a showing of prejudice to the defendant. *See, e.g., United States v. Van Engel*, 15 F.3d 623, 631-32 (7th Cir. 1993) ("A federal judge is not authorized to punish the misconduct of a prosecutor by letting the defendant walk, unless the misconduct not only violated the defendant's rights but also prejudiced his defense, and neither condition is satisfied here."); *United States v. Santana*, 6 F.3d 1, 11 (1st Cir. 1993) ("[T]aken together, *Payner*, *Hasting*, and *Bank of Nova Scotia* form a trilogy admonishing federal courts to refrain from using the supervisory power to conform executive conduct to judicially preferred norms by dismissing charges, absent cognizable prejudice to a particular defendant."); *United States v. Isgro*, 974 F.2d 1091, 1097 (9th Cir. 1992) ("In its recent jurisprudence . . . the Supreme Court has moved . . . toward a rule that a court should not use its supervisory powers to mete out punishment absent prejudice to a defendant."); *id.* ("*Hasting* thus unequivocally rejects the idea that a court may sanction the government for its misconduct without considering first the actual prejudice suffered by the defendant.").

The district court ignored entirely this impressive body of established Supreme Court and appellate court case law, failing even to cite to a single one of the cases discussed above. Instead, the district court relied on a number of district court cases–all of which predated *Hasting* or *Nova Scotia* or both, and most of which are easily distinguishable from the present case in any event. *See* 956 F. Supp. at 657-59, citing to *United States v. Omni Intern Corp.*, 634 F. Supp. 1414 (D. Md. 1986) (dismissing indictment without prejudice); *United States v. Fischbach & Moore, Inc.*, 576 F. Supp. 1384, 1396 (W.D. Pa. 1983) (denying defendant's motion for release of grand jury

transcripts because there was no evidence that the government abused the grand jury process and "no indication of actual prejudice to defendant"); *United States v. Lawson*, 502 F. Supp. 158, 172 (D. Md. 1980) (dismissing indictment without prejudice); *United States v. DeMarco*, 407 F. Supp. 107 (C.D. Cal. 1975); *United States v. Banks*, 383 F. Supp. 389 (D.S.D. 1974). Additionally, the district court relied on three circuit court cases. Two of these predated *Nova Scotia*, *see* 956 F. Supp. at 658, citing *United States v. Serubo*, 604 F.2d 807 (3d Cir. 1979), and *United States v. Hogan*, 712 F.2d 757 (2d Cir. 1983),[8] and the other failed even to cite *Nova Scotia* or *Hasting*, *see United States v. Kojayan*, 8 F.3d 1315 (9th Cir. 1993).[9] Obviously, none of the cases cited by the district court

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[8]*Hogan* is also easily distinguishable from the case at hand, because the court in that case found that the error was not harmless: "If not for the clear prejudice resulting from the AUSA's misconduct, appellants might not have been indicted." 712 F.2d at 762 n.2.

[9]The district court also cited to *McNabb v. United States*, 318 U.S. 332 (1943), for the proposition that the "government's misconduct 'need not be so unfair or imprudent as to offend "due process" before exercise of this [court's] supervisory power is appropriate.'" 956 F. Supp. at 658. (Although the district court's citation suggests that it was quoting *McNabb*, the quoted phrase does not appear in *McNabb*). In *McNabb*, the Supreme Court exercised its "supervisory authority over the administration of criminal justice in the federal courts," *McNabb*, 318 U.S. at 341, to exclude confessions obtained under oppressive circumstances in "flagrant disregard" of the statutory duty imposed by Congress on law enforcement officers promptly to take a person arrested before a judicial officer who can determine the sufficiency of the justification for detention, *id.* at 344-45. *McNabb* provides no support for the district court and

can overcome the force of the controlling Supreme Court authority requiring the district court to find prejudice to the defendants before dismissing indictments based on prosecutorial misconduct.

It is hardly surprising, however, that even in the face of these precedents, the district court declined to make any findings that the defendants were, in fact, prejudiced. As the district court itself noted, the bulk of the misconduct it identified related to discovery violations, and the defendants now have all of the discovery materials to which they could possibly be entitled–and considerably more–available to them for use at their retrials. Thus, any prejudice that arguably existed as a consequence of discovery violations is fully remedied by this court's orders of new trials. *See United States v. Borakinni*, 748 F.2d 236, 237 (4th Cir. 1984) (rejecting defendant's claim that his indictment should have been dismissed because the government failed to produce exculpatory material at his first trial because, even "assuming [defendant] was entitled to the materials at his first trial, his remedy for the government's failure to furnish them was a new trial, not an acquittal"). Similarly, any prejudice to defendants at their original trials that might have resulted from the other alleged misconduct of the government would also be fully cured by retrial.

Defendants contend, nonetheless, that the district court's dismissal of the indictments was proper because, although the

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defendants' contention that the supervisory power can be exercised generally (much less exercised to dismiss indictments) to discipline the government in the absence of prejudice to the defendants, for the Court clearly viewed the government tactics employed in *McNabb* as both prejudicial to the defendants and in clear "violation of [their] legal rights." *Id.* at 346.

district court found it unnecessary to address whether there was a"pattern" of prosecutorial misconduct, *see* 956 F. Supp. at 623, it in fact found a pattern of misconduct, *cf. id.* at 657 (finding that the government's discovery errors "amounted to a pattern of conduct"), and such a pattern is sufficient alone to justify dismissal of the indictments even without a finding of prejudice to the specific defendants before the court. For this contention, the defendants presumably rely upon the Court's statement in *Nova Scotia* that it was

> not faced with a history of prosecutorial misconduct, spanning several cases, that is so systematic and pervasive as to raise a substantial and serious question about the fundamental fairness of the process which resulted in the indictment.

487 U.S. at 259; *see also Morrison*, 449 U.S. at 365 n.2 ("[W]e note that the record before us does not reveal a pattern of recurring violations by investigative officers that might warrant the imposition of a more extreme remedy in order to deter future lawlessness."); *Santana*, 6 F.3d at 11 (noting that the Court may have left open the possibility that the requirement of prejudice is qualified if the misconduct "is plainly improper, indisputably outrageous, and not redressable through the utilization of less drastic disciplinary tools"). This language may suggest that, despite the Court's broad language and reasoning in *Hasting* and *Nova Scotia*, the Court has not entirely foreclosed the possibility that a pattern of prosecutorial misconduct could be so entrenched and pervasive that it would justify dismissal of indictments without a finding of prejudice to defendants.[10] Even if such an exception to the requirement of

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[10]The Supreme Court did not explicitly suggest in *Nova Scotia*, however, that a finding of systematic prosecutorial misconduct was an alternative to finding prejudice as a

prejudice exists, however, we doubt that the Court would apply it where, as here, alternative sanctions–including publicly chastising the attorneys and recommending them for disciplinary proceedings–were available to the court and were not employed prior to dismissal of the indictments. *Cf. Hasting*, 461 U.S. at 506 n.5 (noting that the court should select "more narrowly tailored" means to deter objectionable prosecutorial misconduct). However, because the district court's findings can be read to suggest a pattern of serious prosecutorial misconduct that spans at least these several related cases, we have, at the urging of the United States and of the defendants, undertaken a painstaking review of those findings. And, as we explain more fully below, the record does not even support the district court's individual "findings" of prosecutorial misconduct, much less that there has been an established pattern of prosecutorial

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justification for dismissing indictments. Rather, the Court made its statement in the context of "review[ing] the record to set forth the basis of [its conclusion] that prejudice has not been established," *Nova Scotia*, 487 U.S. at 257, suggesting that it might consider, as a subset of the prejudice inquiry, whether a history of prosecutorial misconduct had jeopardized grand jury independence, *id.* at 257-59. And, indeed, *Hasting* suggests that even a longstanding and pervasive pattern of prosecutorial misconduct does not justify dismissing indictments without a finding of prejudice to the defendants. *See* 461 U.S. at 504 (rejecting the Seventh Circuit's attempt to discipline the prosecutors in its jurisdiction by dismissing indictments despite the Seventh Circuit's findings that the circuit's prosecutors generally "failed to heed the court's prior admonitions" and engaged in the charged misconduct with "disturbing frequency"); *see also Morrison*, 449 U.S. at 367 (characterizing the government conduct, which was insufficient to justify dismissing the indictments without a finding of prejudice, as "egregious").

misconduct in these cases that would justify the extraordinary sanction of the dismissal of the defendants' indictments.

III.

A careful parsing of the district court's lengthy opinion reveals that the district court relied for its scores of conclusions as to wrongful withholding of material exculpatory information and other prosecutorial misconduct largely upon only the defense claims of intentional wrongdoing, rather than upon an independent analysis of the record evidence. That is, the district court often merely recites that the defendants contended that certain materials should have been produced, without itself drawing conclusions as to whether, as a matter of law, the production was required. For example, the district court does not even purport to determine whether any of the assertedly withheld information was material to the defense, cumulative of information already provided, or readily available to the defendants–all of which are necessary inquiries under *Brady* and *Giglio v. United States*, 405 U.S. 150 (1972). In fact, the district court only infrequently makes factual "findings" at all; its opinion rests mostly on implication and innuendo, and much of this is as to matters either extraneous to the proceedings pending before the court or beyond the purview of the federal courts in general. And, when the court does make such findings–none of which are based upon credibility assessments–they are, almost without exception, wholly conclusory: The court either does not explain the basis for the findings or offers what can best be characterized as only a superficial and incomplete analysis of the record evidence. Indeed, in a number of instances, as we explain, the district court simply erred in its assertion that material was not produced and, in still others, contradicted its own findings and assessments earlier in the proceedings as to whether production was required. The same shortcomings appear in those portions of the district court's opinion in which it charges the government with misconduct other than the wrongful

disclosure of information. As with the document disclosure portions of its opinion, the district court often did not even make factual"findings" as that term is conventionally understood, employing mere inference and innuendo instead.[11]

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[11]We discuss these instances fully below, but, for example, rather than explicitly "finding" that Special Agent Clemens and Assistant United States Attorney Barton perjured themselves by denying the existence of an FBI 302 discussing the capital gains matter, the district court merely *implies* such perjury by observing that the subjects of the 302 in question were "big fish" whose mention in a 302 "would certainly have been noticed." 956 F. Supp. at 640-41. In like fashion, the district court never made a finding that SA Clemens perjured himself concerning the late-night visit by him and Cobb to Smith's house; rather, the court said only that Smith's testimony "*indicate[d]* that SA Clemens . . . was not entirely truthful in his testimony." 956 F. Supp. at 648 (emphasis added). So also did the court imply but not actually find that the government's investigation into the capital gains matter was inadequate, noting only that the government's actions "*suggest* a total avoidance of pursuing information that might have proved adverse to Greer." 956 F. Supp. at 660 (emphasis added). And, although the district court seemed convinced that Greer had perjured himself, it was apparently unprepared to make a specific finding to that effect, noting instead that Greer's testimony "would have to be perjured" unless, "[a]lternatively, . . . the government . . . lied to the court" at Greer's sentencing hearing." *Id.* Finally, in some instances, although implying findings, the district court actually expressly declined to make "specific findings" at all, as it did with regard to Cobb's truthfulness in testifying that United States Attorney Daniel authorized Cobb to characterize a $10,000 payment to Senator Lindsay as attorney's fees. *Id.* at 649.

When, on the infrequent occasions the court did make

When the court did make findings, almost never are they adequately supported. And, oftentimes, the district court itself, earlier in the litigation, had specifically rejected the claims of prosecutorial wrongdoing that it ultimately recited as a basis for its decision to dismiss defendants' indictments.

No doubt many of these errors may be ascribed to the simple fact that the district court became overwhelmed by the sheer volume of documents (and other evidence) in this dispute and by the countless individual claims of entitlement that had to be adjudicated in the course of these decade-long proceedings. Even the government and the defendants themselves were overwhelmed by the magnitude of the litigation. That the district court may have become overwhelmed by this protracted litigation, however, did not relieve that court of the ultimate obligation to fully support its conclusions with evidence from the record before it. That obligation is always incumbent upon the court and is heaviest where, as here, the court charges a party litigant with

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a factual finding and it is possible to identify the finding as such, it is often impossible to ascertain as to whom or to what conduct the finding was made, *see, e.g., id.* at 660 (seemingly finding that the government had suborned perjury "in several instances," but without identifying whether the referenced perjury was committed by Cobb only or also by Greer and Clemens); *compare id.* (characterizing Cobb's testimony as "perjurious several times over") *with id.* (stating that Clemens "*apparently*, felt he had to play out the scenario to the end," but without characterizing testimony as "perjurious") (emphasis added), *id.* (stating that Greer *either* perjured himself or the government lied to court), *and id.* (finding that the government "allow[ed] testimony from Cobb, Clemens and Greer that it knew to be *untrue* to stand uncorrected" but without characterizing testimony by three as "perjurious") (emphasis added).

intentional wrongdoing. Upon careful review of the district court's opinion, and of the individual charges of misconduct recited therein, we are convinced that this obligation simply was not properly discharged by the district court.[12]

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[12]At oral argument before this court, we asked defense counsel and counsel for the government whether they would agree that the nine categories of misconduct recited by the United States at page 25 of its principal brief comprised the bulk of the district court's "findings" of prosecutorial misconduct. Both counsel agreed that virtually all of the misconduct grounds addressed by the district court were included within these categories, a fact confirmed by our own exhaustive review of the record. Accordingly, the court has generally addressed itself only to these categories and the individual assertions of misconduct incorporated within these categories. These categories, as they appear on page 25 of the government's brief, are as follows:

> (1) Failing to disclose FBI 302 reports in which Cobb indicated that he had made payments to other legislators to keep them friendly and expressed uncertainty about whether such payments were "bribes." J.A. 234-36.
>
> (2) Failing to disclose other exculpatory evidence, including tape recorded conversations. J.A. 236-40, 274-77.
>
> (3) Allowing Cobb to commit perjury by testifying, without correction, that he had never given Senator Lindsay any "bribes or illegal money." J.A. 244-54.
>
> (4) Presenting testimony from an FBI agent who falsely denied that he had prepared a report

A.

The district court ultimately concluded that "much of

> relating to Cobb's payoffs to Lindsay in connection with the Capital Gains tax, and having an AUSA falsely represent to the court that no report of this interview existed. J.A. 247-49.
>
> (5) Placing a 2:00 a.m. telephone call to Senator Lindsay, and then falsely testifying that the purpose of this call was merely to warn Lindsay of upcoming negative publicity. J.A. 261-71.
>
> (6) Permitting Richard Greer, the former head of the South Carolina State Development Board, falsely to deny his knowledge of the capital gains bribery scheme to the grand jury investigating that matter. J.A. 254-61.
>
> (7) Failing adequately to investigate the capital gains matter, and avoiding the pursuit of any information that could prove adverse to Greer. J.A. 254-61, 294-95.
>
> (8) Withholding evidence of Cobb's drug usage both before and after his employment by the government. J.A. 271-74.
>
> (9) Allowing Cobb to take control of the sting operation and to target particular legislators in violation of regulations that required him to act more passively. J.A. 277-80.

Br. of United States at 25.

the government's misconduct actually stem[med] from its failure to disclose evidence to the defendants." 956 F. Supp. at 659. Said the court:

> The withholding of such a voluminous array of discovery which the government had to know was exculpatory and relevant to the defenses of these defendants is unprecedented before this court. The court finds that these violations are too numerous and too specific to certain issues to be considered simply unintentional or the result of neglect.

Id. at 658-59; *see also id.* at 657 (rejecting the Office of Professional Responsibility's finding that "incremental mistakes and misjudgments" by the FBI and prosecutors, and not "intentional and wrongful decisions to conceal," caused the discovery failures).[13]

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[13]Apparently to emphasize exactly how numerous the violations were, the district court noted that "[i]n undisputed testimony . . . the court was informed that prior to his trial Taylor received only 66 of the 550-plus-or-minus 302s and 26 of the 227-plus-or-minus tapes that are now in defendants' possession. The number of 302s and tapes received pretrial by the other defendants would vary only slightly." 956 F. Supp. at 657. What the district court failed to acknowledge, however, was that–by its own admission–the vast majority of the documents the government has produced to the defendants on remand are completely and indisputably irrelevant to the defendants' cases. *See* J.A. at 1520 (district court noting that "at least 90 percent" of the documents produced *in camera* and later provided to the defendants "really has no relevance as to what we are here about now"). The government's failure to produce, prior to defendants' trials, "volumes" of irrelevant documents to which the defendants were not legally entitled

1.

Underlying much of the district court's reasoning that the government had wrongfully withheld material exculpatory information was the court's apparent belief that the case was tried under a so-called "open file policy," pursuant to which the government agreed to turn over essentially all of its documents to the defendants in return for the comfort of knowing that neither *Brady* nor *Giglio* would be relevant throughout the protracted proceedings. Thus, the district court began its entire opinion detailing what it perceived to be the "egregious prosecutorial misconduct" as follows:

> From the outset, these cases were to be tried under what is referred to in this district as an "open file policy." During its tenure on the bench, this court has conducted numerous criminal trials under this policy and never before has its interpretation been so challenged as in the government's present arguments. As a lawyer and a judge, this court's experience has been that "open file" meant that the government's entire discovery file would be made available to the defendants for their examination. . . . It has long been established that when an "open file" policy is declared, the dictates of *Brady* and *Giglio* as well as Bills of Particular, become extraneous; *all* discovery material, except as limited to privileged work product, is made available to the defendants. This would have come as no surprise to USA Daniel or his assistants, most of whom had

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certainly cannot be viewed as error, much less "egregious prosecutorial misconduct."

> prosecuted cases before this court on numerous occasions.
>
> [M]otions to dismiss for prosecutorial misconduct had been filed by one or another of these defendants during the preparation and pendency of their original trials in 1990 and 1991. One of the primary grounds on which those motions and the more recent motions are based is the wilful withholding of *Brady* and other exculpatory material.

956 F. Supp. at 632.

Notwithstanding these statements in the district court's order, it is evident from the record that the government never agreed to conduct these prosecutions under an "open file policy" in the sense that the district court suggested in its order of dismissal. Not only did the defendants each file numerous discovery requests under *Brady*, and motions for bills of particular, but the district court closely supervised the discovery, meticulously and painstakingly hearing, considering, and adjudicating each individual dispute. Indeed, as the government notes, the defendants themselves "essentially abandon[ ] the district court's theory about the 'open file' policy." Reply Br. of United States at 16; *see also* Reply Br. of Prosecutors *Amici* at 4; Br. of Appellees at 20 ("Whether or not there was an 'open file policy,' the government had clear obligations to comply with *Brady v. Maryland*, Rule 16, Federal Rules of Criminal Procedure and 18 U.S.C. § 3500 (the Jencks Act).").

Both the prosecution and the defense proceeded on the understanding throughout the pretrial and trial proceedings that the government had not opened its files in the manner suggested by the district court. The prosecution made clear

early on, in September of 1990, that it only intended to provide those materials required by rule and statute:

> The Defendant's "motion for Bill of Particulars" is tantamount to a general discovery request and the majority of the matters inquired about are not properly requested by way of a bill of particulars. However, the United States does recognize its obligations to provide the Defendant with certain information pursuant to Rule 16 of the *Federal Rules of Evidence* and 18 U.S.C. 3500, and the United States intends to conduct discovery in this case in an 'open file' manner to the extent that all matters discoverable pursuant to Rule 16 [of the Federal Rules of Criminal Procedure] and 18 U.S.C. § 3500 will be provided to the Defendant prior to trial.

J.A. at 317 (United States Response to Taylor's Motion for Bill of Particulars); *see also* J.A. at 415-17 (reading same into record at court's request at October 1990 hearing). At the Blanding hearing on November 19, 1990, the government again repeated its position that it was not proceeding generally under an open file policy:

> COURT: Do you have an open file policy here?
>
> [PROSECUTION]: Well, your honor, I'm always hesitant to say that, in view of the discovery motions that I see coming forward. Everything that they are entitled to discover under Rule 16, everything under 18 U.S.C. 3500, and anything the government intends to use at trial, I have produced for them.

J.A. at 531-32. And, as late as April 1991, during the Derrick trial, the government continued to assert that it was conducting discovery in the case in an open file manner only "to the extent that all matters discoverable under Rule 16 and Title 18, United States Code, Section 3500 will be provided to the defendant," J.A. at 887 (United States Response to Defendant's Motion for Discovery and Inspection), withholding documents which it believed were not producible under either the rule or the statute, *id.* at 888-94 (United States Response to Defendant's Supplemental Motion for Discovery and Inspection).

The defense, through defendant Taylor's counsel, likewise stated repeatedly that it did not believe that the government had opened its files in the manner believed by the district court. During the court's October 19, 1990, hearing, in response to the court's observation that the defense could not have both an open file policy and a bill of particulars, Taylor's counsel, Joel Collins, stated:

> I think I understand what you are saying by that, Your Honor. Let me just say I have never believed that we were operating under an open file policy.

J.A. at 420; *see also id.* at 419 (Taylor's counsel stating his understanding that the case was being tried under bills of particular). And, again in October of 1994, Taylor's counsel repeated his view that there was no open file policy:

> MR. COLLINS: I have never operated on the assumption that there was an open file policy after some time in October of 1990–
>
> THE COURT: But you talked like you think it's one.

> MR. COLLINS: We think there ought to be one now, Your Honor.

J.A. at 1321.

Finally, it is clear from the district court's own statements and actions that–even if it mistakenly believed such initially–not even the court believed throughout the proceedings that the government had an open file policy, or, at least an open file policy of the kind suggested in its 1997 order. As early as 1990, after extended discussion of the issue on the record with counsel, the district court concluded that, although it had been confused to that date, the parties in fact had not agreed to an open file policy:

> THE COURT: Skip on down there to where you get to the part you are telling me that you all are having an open door like policy and that you are not responding to his bill of particulars. What I guess I am trying to say if they have been laboring certainly we haven't in 100 percent kept up–we have been kind of treating it like it was open file policy when he keeps saying he didn't get this and that, and I have been making you all give it to him. With a bill of particulars we don't get involved in any of that.
>
> MR. DANIEL (reading from prior submission by government): . . . "[T]he United States does recognize its obligations to provide the defendant with certain information pursuant to Rule 16 of the Federal Rules of Evidence and 18 U.S.C. Section 3500. And the United States intends to conduct discovery in this case in an 'open file' manner to the extent that all matters discoverable pursuant to Rules 16 and 18

U.S.C. 3500 will be provided to the defendant prior to trial."

. . .

THE COURT: I guess what I am trying to get to, Mr. Collins, if we are operating under a bill of particulars case, we are doing things one way. I thought we were operating under an open file case. Once you get the responses to that bill of particulars, then you are stuck, he is stuck, everybody is stuck. That is what the case is all about.

. . .

I am becoming more and more in favor of bill of particulars myself. I know the U.S. Attorney's Office and most defendant's lawyers become more and more opposed to them because it closes out a lot of things that could come to light with an open file policy. I guess my question to you right now is, is it your understanding this case is being tried under this bill of particulars?

MR. COLLINS: Yes, sir, it sure is. The government–

THE COURT: You don't have to tell me anymore.

MR. COLLINS: May I make a further response to what the U.S. Attorney said?

THE COURT: You can make another response. I am just trying to close it on down and narrow

up what we are doing. I wanted you to make sure you are aware as to what you might be narrowing yourself down to. An open file, as you know, is completely different from trying a case under a bill of particulars.

. . .

THE COURT: What I am telling you is that by them responding to the bill of particulars and what they told you that is the only obligation they have in this case from their own. That is why you have to be very particular about the questions that you ask in your request for the bill of particulars, that you just can't–I guess you can't have an open file policy and a bill of particulars.

MR. COLLINS: I think I understand what you are saying by that, your Honor. Let me just say I have never believed that we were operating under an open file policy. . . .

THE COURT: What I am getting at is I don't know whether that came about as a result of me laboring under the theory you all were working under an open file policy or whether in the bill of particulars you particularly asked what tapes they were going to use.

. . .

THE COURT: I guess what I am trying to tell you. I don't know because I stopped fooling with the bill of particulars and started treating it like it was an open file policy. They might not have to give you those tapes. I don't know

whether they do or not. I have to go back to the bill of particulars and see what kind of parameters have been set up, and bound to be set up for the trial of this case. That is what the bill of particulars is all about. You asked the questions and they give you the answers, and both sides are stuck with that and the case goes to trial.

. . .

THE COURT: . . . I was kind of putting you on notice if in fact some of these other things, and I don't know how protected or unprotected they are, if we are operating under the bill of particulars, then the court's rulings up to this point might not necessarily have confined the government to the bill of particulars. *I may have gone outside of what they had to do because I thought, and I guess through an error of mine, that we were operating under an open file policy. That is about it.*

. . .

THE COURT: I may have to do some backtracking now because I was under the opinion we were operating under the open file policy. From here on forward I am going to this bill of particulars. I don't think anything I ruled earlier could have prejudiced the defendant, and I don't know what might be coming in the future. You heard me say this more than one time in other cases. I have about come to the conclusion it is a lot better for the court to make a case operate under a bill of particulars rather than fool around with so called open file

> policies. That way we can eliminate a lot of Brady problems. A lot of problems we can eliminate. That is all. I just want to know how we are going to run from here on because this case has got to end sometime.
>
> . . .
>
> *THE COURT: . . . My only question to you is are we operating on an open file policy or this bill of particulars which was filed, responses to them, September 19th. It is your indication that is what we are operating on so I will operate on that throughout the rest of the case. The government better be prepared to have done what they said. I don't have to worry about anymore open file questions.*

J.A. at 410-27 (emphases added).

And the district court seems to have carried this understanding–that the case was not being conducted pursuant to an open file policy–through the remainder of the proceedings until the time when it entered its final order of dismissal. Said the district court at the October 20, 1995, hearing, for example:

> Now, at the very outset of this matter, and I don't want to get involved with who it might–but I had suggested way back with members of the U.S. Attorney's Office that I had the highest respect, as much as anybody I know, and we both were of the opinion that we ought to just have what's an open file. That's different to you than me, but we ought to put everything out and let the defendants get whatever they wanted out of it and then let's get on with the case.

> *Well, the U.S. Attorney's Office wasn't willing to do that, and I'm sure they had their reasons, and I wasn't going to order them to do such a thing, because, you know, I have never ordered anybody to have an open file.* It seems to me if they want to file bills of particulars and fool around with them all for months at a time, but it looks like we're working more and more towards me having to do some sort of thing of that nature.

J.A. at 1935-36 (emphasis added).

Accordingly, the record–indeed, the court's own statements–simply does not support the district court's inexplicable conclusion that the parties had proceeded under a full open file policy from the outset of the case.

2.

The first specific example of egregious prosecutorial misconduct cited by the district court was the alleged improper withholding of three FBI 302s prepared by Special Agent Clemens and dated June 14, 1989, June 22, 1989, and July 26, 1989, in which Cobb said that he had made payments to many South Carolina legislators over the years other than defendants Taylor, Blanding, Gordon, Derrick and Long, but refused to characterize those payments as "bribes." 956 F. Supp. at 632-34. The June 14, 1989, FBI 302 states:

> COBB related that in regards to giving money to State Legislators, he routinely gives two or three hundred dollars to some just to keep them friendly toward him. . . . COBB stated that TEE FERGUSON, CHARLES A. HARVIN, III and DONNA MOSS were among those who he would give money. COBB

indicated this money was not paid for any specific return benefit other than having someone friendly to him on whom he could call.

The June 22, 1989, FBI 302 states in pertinent part:

> RONALD L. COBB provided a 1989 South Carolina Legislative Manual in which he had checked off all those legislators to whom he had paid money. When asked if these were bribe type payments or campaign contributions COBB replied, "That's a hard question to answer." COBB was then asked if those checked off were persons he had given two, three, or four hundred dollars to for no specific reason other than to maintain favorable contact with COBB. COBB indicated that this was the case, and indicated he would give the money to the legislator and that was it. If the individual then wanted to claim it as a campaign contribution and report it or just stick it in his pocket, that was of no concern to COBB.

Finally, the July 26, 1989, FBI 302 similarly reads:

> COBB was asked about the manner in which he would pay legislators several hundred dollars. COBB stated that this was sometimes accomplished with cash, and sometimes by check, either from his business or personal account. COBB advised that sometimes payments were made at official fund raisers and sometimes in a social setting as a token of appreciation for support on something. COBB stated that sometimes a legislator will drop a hint that money is tight and that they could use

> some cash. COBB added that if it was someone who was friendly toward his interests he would take care of them with a few hundred dollars. COBB emphasized that he did not know and did not care how they handled or reported the money. COBB's sole interest was to gain friends and supporters of his interests.

The district court noted that the language from these three FBI 302s was included in the FBI Columbia Office's 1989 prosecution authorization proposal, which confirmed to the court that the government "was totally familiar with the existence of these 302s," but "yet [the government] did not turn [these 302s] over to the defendants for use at trial." 956 F. Supp. at 634. The district court concluded that these FBI 302s could have been used by the defendants to impeach Cobb's testimony that his payments to them were bribes, and thus to support their defense that the payments were in fact campaign contributions:

> Evidence of how Cobb often paid various legislators a few hundred dollars to "keep them friendly" and that it was no concern of his how the recipients handled the monies, was not furnished by the government so as to allow the defendants to attempt to impeach Cobb's testimony that the payments he made to these defendants (excluding Long) were known by him and by them to be bribes.

956 F. Supp. at 660.

At least defendant Long–and apparently defendant Derrick, as well[14]–received both the June 14 and the June 22 FBI 302s prior to trial, a fact not noted by the district court in its opinion. *See* Br. of Appellees at 40 (acknowledging that Long had access to the June 14 and June 22 FBI 302s). Apparently, the only one of the FBI 302s that these two defendants did not receive was that of July 26. Thus, of the defendants now before the court (Derrick, Long and Blanding), it appears that only defendant Blanding failed to receive all three of these FBI 302s.

It is doubtful whether these three FBI 302s–which the Department of Justice's Office of Professional Responsibility concluded were not intentionally withheld by the prosecution but rather were not produced by the FBI to the United States Attorney's Office–were even "exculpatory," or, if so, "material," and thus producible pursuant to the requirements of *Brady v. Maryland*, 373 U.S. 83 (1963). The premise of the suggestion that these documents were exculpatory appears to be that campaign contributions cannot, as a matter of law, be the subject of a Hobbs Act prosecution. Therefore, the argument goes, if the defendants could–by analogy to the payments made by Cobb to other legislators–show that Cobb's payments to them were campaign contributions, their Hobbs Act prosecutions could not stand.

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[14]The government has in its files "a letter to Derrick's counsel transmitting this document [the June 22, 1989 FBI-302] before his trial," and it moved in the district court to have this letter included in the record before this court. Reply Br. of United States at 20 n.14. The district court has now granted that motion and, accordingly, we grant the consent motion of the United States to supplement the joint appendix.

However, as the Supreme Court has held, campaign contributions may be the subject of a Hobbs Act violation, no less than any other payments,

> if the payments are made in return for an explicit promise or undertaking by the official to perform or not to perform an official act. In such situations the official asserts that his official conduct will be controlled by the terms of the promise or undertaking. This is the receipt of money by an elected official under color of official right within the meaning of the Hobbs Act.

McCormick, 500 U.S. at 273; *see also Evans*, 504 U.S. at 268 ("We hold today that the Government need only show that a public official has obtained a payment to which he was not entitled, knowing that the payment was made in return for official acts."); *United States v. Montoya*, 945 F.2d 1068, 1074 n.2 (9th Cir. 1991) (noting in prosecution for receipt of illegal honoraria, not campaign contributions, that "[t]he critical question is whether the payments were induced and whether a *quid pro quo* exists, not how an official labels the payments in his defense to a charge that the payments were extorted"). Because the mere characterization of a payment as a campaign contribution does not insulate that payment from Hobbs Act prosecution, it is difficult to discern even how the FBI 302s, reciting the frequency with which Cobb made payments to legislators and Cobb's refusal to characterize the payments he made to other legislators as either campaign contributions or bribes, could be considered exculpatory. It is less clear still how these documents could be considered "material," given that they related to individuals other than the defendants, and the payments received by the defendants as *quid pro quo* in return for their official votes were recorded on both videotape and audiotape.

In any event, the substance of Cobb's testimony was well known to the defendants. Thus, the defendants were free to question Cobb as to which individual legislators he made payments and the circumstances under which the payments were made.

First, each of the defendants was provided a copy of Cobb's grand jury testimony, in which he both stated that, over the years, he had routinely made $200-$300 payments to a number of legislators, and declined to characterize the payments as either campaign contributions or bribes. Cobb testified before the grand jury on July 17, 1990, for example, that he had often made payments to legislators:

> [O]ver the years, its been very customary and not unusual at all to give a guy a couple of hundred bucks, $300 bucks along, because he has helped you. And sometimes he'll come and say, look man, I'm going out. I want to do this. Can you help me out a little bit. So that's not unusual at all.

J.A. at 2400. And during the same grand jury appearance, in response to a question from a grand juror, he likewise declined to characterize these payments as either campaign contributions or bribes:

> Q: Is this–do you consider that when you give [the cash] to [the legislators], do you consider that a political contribution or a bribe when you give it to them? In other words, when you state your case or whatever and hand them money, do you say, this is a political contribution or a campaign contribution or is this something for you?

> A: In a situation like that, it's kind of understood if I pull cash out of my pocket and give it to, Mr. Legislator, and you put it in you pocket, then I don't know nothing and you don't know nothing.

Id. at 2401.

In addition to receiving Cobb's grand jury testimony, the defendants also received a copy of a May 1, 1989, FBI 302 in which Cobb was reported to have said that he "ha[d] made many contributions in the $300 to $500 range to elected officials over the years," and that "most of these contributions would be legal in the strict sense of the word, but his reason for making them was for favorable consideration of his lobbying efforts." J.A. at 2177.[15] Thus, it is plain that the defendants were fully aware of the very same information included within the FBI 302s from a number of other sources. Indeed, that Cobb had frequently made payments to other legislators in the past appears to have been a fact well known to all from the inception of the prosecution.

The Supreme Court has said that "[t]he mere possibility that an item of undisclosed information might have helped the defense, or might have affected the outcome of the trial, does not establish 'materiality' in the constitutional sense." *United States v. Agurs*, 427 U.S. 97, 1109-110 (1976); rather, "[t]he

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[15]Additionally, at the February 28, 1991, evidentiary hearing on the motions to dismiss indictments–which was held during the Blanding/Gordon trial–Special Agent Clemens testified that he had prepared from the legislative manual an FBI 302 listing the names of all of the legislators to whom Cobb remembered making payments over the years. J.A. at 835-36. Blanding and Gordon were therefore clearly aware of that information prior to the conclusion of their trial.

evidence is material only if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different." *United States v. Bagley*, 473 U.S. 667, 678 (1985). From the foregoing, it is apparent that, in no sense at all, can it be said that the proceeding below would have been different had the defendants been provided the three FBI 302s discussed.

Accordingly, because *Brady* did not require production of these three FBI 302s, the prosecution's failure to produce the documents to defendants was not error--much less intentional misconduct.

3.

As another example of egregious prosecutorial misconduct, the district court cited to the government's failure to produce the July 18, 1990, FBI 302s of defendant-legislators James Faber, Frank Earl McBride, and Ennis Maurice Fant, in which each legislator characterized as "campaign contributions" the payments he received from Cobb in connection with the parimutuel betting legislation. 956 F. Supp. at 634. In a single sentence, the district court stated, without substantive explanation, that "[e]ven had the defendants not been able to utilize these 302s at trial as statements of unavailable witnesses . . . it is the opinion of the court that these 302s should have been provided as relevant discovery material." *Id.*

As with the FBI 302s of Cobb, in which Cobb admitted making payments to many different South Carolina legislators but refused to characterize the payments as either campaign contributions or bribes, it is difficult as a threshold matter even to discern the relevancy of the Faber, McBride, and Fant 302s to defendants' Hobbs Act prosecutions. That these three legislators regarded the payments they received as campaign contributions, rather than bribes, would appear to be neither exculpatory nor material for the same reasons that Cobb's FBI

302s would not have been exculpatory or material. The exculpatory and material character of these FBI 302s is diminished even further, if not eliminated altogether, by the fact that each of the three legislators were either unindicted targets or had actually been indicted and pled guilty at the times of the defendants' trials; thus, their testimony that they regarded the payments they received, not as bribes, but as campaign contributions, could hardly be considered exculpatory. Moreover, as the district court recognized, the statements by the legislators in these FBI 302s likely would not even have been admissible at trial because they are hearsay.

4.

The district court additionally admonished the government for not producing to the defense certain video and audio recorded conversations dated January 16, 1990, and April 5, 1990, between Cobb and state legislator Robert Kohn, whom Cobb paid to recruit other legislators to support the parimutuel betting legislation. During the January 16 conversation, the following exchange took place between Kohn and Cobb:

> COBB: And if we make a showin' and you're gonna see what they do, I mean, they, and they're willin' to do, they'll do whatever I ask 'em to do.
>
> KOHN: See, I, I think that they, we got the thing out of committee with no one doing anything.
>
> COBB: Yeah, yeah.
>
> KOHN: No money, and you know, just, just doin' for the issue. Now the Baptist Courier sent their note out last week, I mean, and its gonna be, they're, they're gonna follow it. So people

that are under the control of Baptist Courier are gonna run.

COBB: How many people do you think that we can, that we can get the one-on-one situation with and where we give them the right motivation, like I say, we gotta, you know, we gotta do a good showin'.

KOHN: I'm sure we can, no, we, no I think we can do well on that.

. . .

KOHN: Let me start, I'll start first thing in the, well hell, I might even start tonight.

COBB: Right.

KOHN: (Unintelligible)

COBB: You know how to, I mean you know how to work it and cover us, I mean, we don't want come [sic] over there and say well, here, they're gonna buy the damn thing.

KOHN: No I understand.

J.A. at 2337-2340. And during the April 5 conversation, Kohn tells Cobb:

I'm not trying to hold back, I mean I realize (unintelligible) I ain't trying to play that game. (Unintelligible) I've been asked for gold coins. If it doesn't look like money should be brought up, I don't do it to hold back money, I just don't think it's good to bring it up

> (unintelligible). I use (unintelligible) some of them I just casual comment about a contribution to their campaign 'cause see if you have to do that I can write a check and tell them I think their [sic] a good spirited citizen (unintelligible).

956 F. Supp. at 635. Again without any explanation, and in a single conclusory sentence, the district court recited merely that,

> [t]hese tapes, as well as the numerous other audio and video tapes furnished to the defendants on November 29, 1993, certainly must be viewed as exculpatory evidence which could have been used to further the defense put forth by these defendants that they considered the monies they received from Cobb to be campaign contributions.

Id. at 636. Presumably the district court concluded that, as legislator Taylor had argued, the January 16 tape established that the payments he received were not a *quid pro quo* for his support of the parimutuel betting legislation because this bill had been voted out of his committees prior even to institution of the sting operation. *See id.* at 635. It cannot be determined what underlay the district court's conclusion that the April 5 tape of the telephone conversation between Kohn and Cobb should have been produced, except that Taylor's name appeared in the FBI 302 that reproduced the transcript of the telephone conversation and it "[was] impossible for the court to ascertain whether [Taylor] was present at the time the [quoted] statement was made to Kohn." *Id.* at 635. Because Taylor's name"[did] appear in the cover FD-302, yet he was not furnished this tape

or the FD-302 and transcription prior to his trial," the district court reasoned that the tape was wrongfully withheld.[16]

With respect to the January 16 tape, it appears that the district court was simply incorrect that it had not been produced by the government. In fact, as Taylor's counsel Joel Collins candidly acknowledged in open court, J.A. at 420, the tape had been produced for inspection pursuant to the district court's order, but he simply had not had an opportunity to view it.

Apart from the fact that defense counsel was provided access to the January 16 tape, it is hard to imagine, as with the FBI 302s of Cobb and of the three co-conspirator legislators, how this tape is exculpatory or material. Even assuming that Taylor supported the parimutuel betting legislation in committee the previous spring, *see* J.A. at 2338 (statement of Kohn that "nobody's really done anything since the committee last spring voted on the thing"), it was still possible that he violated the Hobbs Act by receiving money in return for his continued support of the legislation on the floor of the Statehouse. The receipt of money, even for official action that would have been taken anyway, violates the Hobbs Act, as we held in *United States v. Paschall*, 772 F.2d 68 (4th Cir. 1985), *cert. denied*, 475 U.S. 119 (1986).

It is unclear whether the April 6 tape, in particular, was produced to the defense, but, in any event, it was neither discoverable nor ordered produced by the district court. Not only is the conversation recorded on this tape not (at least not

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[16]The district court explained that it was reasoning primarily from the submissions made by Taylor, Blanding, and Gordon, and that "some, although by no means all, of the previously withheld evidence was available to [Derrick] and defendant Long for their trials." 956 F. Supp. at 636 (footnote omitted).

evidently) exculpatory, describing only the care with which Kohn decided whether or not to raise with legislators the question of money in return for their votes, but the record establishes clearly that, at the October 11, 1990, evidentiary hearing conducted by the court, the government offered to provide this and all other tapes to the court for its review and determination of whether exculpatory information was included, an offer which Taylor's counsel rejected. *See* J.A. at 353 (statement of Mr. DuTremble that "I am willing to provide the court with all tapes. And the government's position is let the court make an independent determination, that is, as to what is or is not exculpatory"); *id.* at 343 (statement by Joel Collins that "I would like the record to show that we would like to withdraw our consent to the in camera review of potentially exculpatory evidence."). Furthermore, the order entered by the district court at the conclusion of its full evidentiary hearing on October 11, 1990, during which this and the other tapes were discussed, required only that the government produce for defense inspection "videotapes" in the government's possession, and thus did not cover the April 6 tape, which was an audiotape. *See* J.A. at 395-97 (district court order).

5.

The district court also relied in part for its dismissal of the defendants' indictments on the nonproduction of copies of nine checks written by Cobb to various South Carolina legislators in amounts ranging from $100-$650. The district court noted that the defendants argued that copies of these checks would have "corroborate[d] the information . . . from the FD-302s of June 14, 1989, June 22, 1989, and July 26, 1989, and that this information would have served to refute Cobb's testimony at the trials that the payments he made to these defendants were definitely known by them to be bribes." 956 F. Supp. at 634 (citation omitted).

Again, the district court offered no analysis or reasoning in support of its conclusion that these documents should have been produced. The court simply repeated that the defendants *argued* that copies of these checks would have aided them in their defense.

We are unable to divine how these checks written by Cobb to legislators other than the defendants would be exculpatory or material. "Corroboration" of the fact that Cobb had made many payments over the years to other legislators was unnecessary, as there was ample evidence of this fact and the fact was not disputed; nor is it apparent how these checks would have served to refute any suggestion by Cobb that his payments to the defendants were bribes. Even the district court did not initially order production of these checks when, in 1995, they, and other materials, were provided to the court for *in camera* inspection. When, upon subsequent motion, the court concluded that these documents "were not properly identified by the court in its original *in camera* review," J.A. at 1112, 1443 n.1 (district court order of Sept. 7, 1995), and should be produced, *id.* at 1444, 1455, the district court stated only that "[a]t this point, . . . the court simply states that it is of the opinion that these documents should now be turned over to the defendants." *Id.* at 1444.

6.

The district court rested its dismissal of defendants' indictments also upon the government's failure to produce all of its files bearing on Cobb's drug use from 1988, forward:

> The full scope of Cobb's drug usage was often sought by the defendants in their quest for discovery materials which might impeach Cobb's testimony at defendants' trials. On November 29, 1993, the defendants received a minimum of six FBI documents which revealed

> that Cobb had been under investigation by the FBI for drug violations since early 1988, and that he had used cocaine on at least two other previously unknown occasions in May of 1989, after he went to work for the FBI. Several of these documents indicate that Cobb was reputed to be a cocaine "trafficker" and implicated others, such as Greer and Kohn.
>
> In contrast to representations by the government on the record in open court that they had given the defendants each and every tape they had, some 50 audiotapes and 118 FD-302s, which contain evidence bearing on Cobb's drug usage and trafficking, were received by defendants in February of 1995.

956 F. Supp. at 650 (district court op.; citations omitted). As a consequence of the nondisclosure of these documents, the district court concluded,

> [a]ll of the defendants . . . were unable to impeach Cobb's testimony and confront him with the fact that he had been involved in drugs on more occasions and over a longer period of time than disclosed, and that his involvement in drugs was so deep that he had earned the reputation of a "trafficker."

Id. at 651.

These documents were, as the district court noted, not produced to the defendants prior to their trials. Additionally, it appears that the defense also did not receive, prior to trial, the information relating to Cobb's drug use in May of 1989. However, each of the defendants did receive copies of Cobb's grand jury testimony in which he detailed his drug purchases

from and for South Carolina legislators and his personal use of cocaine during 1987-88, including his personal use of cocaine with the individual legislators. *See* J.A. at 2402-16 (grand jury testimony). Before the grand jury, Cobb testified essentially that he had gotten together with a group of individuals every week or so during 1987-88 to do drugs. *See, e.g.*, J.A. at 2414; *see also id.* at 2407 (statement by Cobb that "you would have a little get together with people who use cocaine. And certainly I would use it, and I did it, too."). Cobb also testified before the grand jury that he had actually used cocaine in 1989, and as late as the latter part of 1989. J.A. at 2414-16.

As the district court noted, in addition to Cobb's substantial grand jury testimony concerning his cocaine purchases and use, "Cobb's drug usage on the dates of October 13, October 18 and November 18, 1989, was disclosed at the [defendants'] trials," Cobb's "indictment for possession of cocaine on February 2, 1990, and January 11, 1991, was returned a few days prior to the Blanding/Gordon trial," and Cobb "pled guilty to these incidents prior to the Derrick and Long trials." 956 F. Supp. at 649-50. Moreover, as the Department of Justice explains, each defendant was also apprised of Cobb's"drug-related arrest in 1989, including the fact that it occurred while Cobb was attempting to purchase a kilogram of cocaine." Br. for the United States at 65. Additionally, Cobb testified during the Blanding and Gordon trial that he had used or provided cocaine to South Carolina legislators 50-60 times.

Against the backdrop of the considerable amount of evidence known by or provided to the defendants about Cobb's personal cocaine use and distribution over the years, including use in 1989 after his employment with the government began, it is impossible to conclude that the investigatory documents generated in 1988, prior even to the initiation of the Lost Trust investigation, and the documents revealing only a handful of

previously unknown personal uses in May of 1989 and in 1990 and 1991, were anything but cumulative and immaterial.

7.

The district court also concluded that the government had wrongfully failed to produce to defendant Taylor a December 6, 1989, videotape of legislator Kohn selling Cobb $500 worth of cocaine and using cocaine. The district court said that it had referenced this issue "to show the cumulative effect on the defense of potentially impeachable material not being fully or timely disclosed." 956 F. Supp. at 651.

Again, we are at a loss to understand the reason for the district court's inclusion of this incident as an example of "egregious prosecutorial misconduct," because the district court itself, in its own opinion, recognized that the prosecution had apprised Taylor's counsel of the tape by letter before trial and that, as with the other video tapes, *see* discussion *supra*, Taylor's counsel, simply had not had time to view the tape:

> Taylor concedes that he received a letter from the government very shortly before trial telling him that the government had evidence of Kohn giving cocaine to Cobb. He argues that he was deeply involved in preparing for trial; and that since this is all that he was told, he did not take the time to pursue it.

956 F. Supp. at 651. The district court even noted that "[a]lthough it is the government's responsibility to disclose evidence to the defendants in a timely and honest manner, it is also the responsibility of the defense to review that evidence when it is disclosed." *Id.* In any event, it is doubtful whether the tape would have been admissible at trial, given that Kohn testified at trial to his extensive drug and alcohol use. *Id.* (district court noting that "Kohn's involvement in the extensive

use of cocaine and alcohol was admitted by him during the trials").

B.

Through innuendo only, and without any explanation as to any conclusions it drew, the district court also suggested in its order that FBI Special Agent Clemens and Ron Cobb perjured themselves concerning an October 18, 1990, early-morning visit by Clemens and Cobb to the home of Steven H. Smith, a close friend of Senator Lindsay, and a telephone call that morning to Lindsay by Clemens and Cobb, during which the issue of Cobb's payment of $10,000 to Senator Magnum and Senator Lindsay in connection with the Oil Jobber's Bill was discussed. (All of the defendants knew of this visit and call before their trials; accordingly, the issue is not disclosure, but, rather, possible wrongdoing by the prosecution and the FBI agent involved.) The district court intimated that Clemens lied when he testified that the purpose of the telephone call was to inform Lindsay that Cobb was going to testify as to the $10,000 payment the following day at the Luther Taylor trial, and that Cobb similarly lied (at least initially) that this was the purpose of the telephone call.

Clemens testified at the district court's February 28, 1991, evidentiary hearing that the purpose of the visit and the telephone call was to enable Cobb to tell Lindsay of Cobb's expected testimony about the payment the next day so that Lindsay, Cobb's close friend, would not first learn of the testimony through the media. J.A. at 823-25. Clemens testified that when Cobb became too emotional to carry on the telephone call with Senator Lindsay, he (Clemens) informed Lindsay of Cobb's impending testimony as to the Lindsay payment. J.A. at 839-40.

Cobb likewise testified that the purpose of the telephone call was so that he could tell Lindsay that he was going to

testify about the payment before Lindsay learned of the testimony from the media. J.A. at 812-14 (testimony of Cobb). Cobb denied that the purpose of the telephone call was to determine, with Lindsay, how to characterize the $10,000 payment. J.A. at 814-15 (testimony of Cobb).

Following this testimony by both Clemens and Cobb in February of 1991, the district court denied Blanding's and Gordon's motion to dismiss their indictments on the ground that Clemens and Cobb had perjured themselves and that the purpose of the telephone call was to coordinate witness testimony.

In April of 1991, after the Blanding and Gordon trial, when Taylor was seeking bail pending appeal, Smith also testified to the October 18 events. He detailed his understanding that Cobb wanted to characterize the $10,000 payment as a legal fee, but that Agent Clemens insisted that he could not do so because the payment was not for legal services. J.A. at 911-12, 917 (testimony of Smith).

This was the state of the record until four and a half years later, in October of 1995, when Smith testified to the events again. At this hearing, without explaining its omission from his testimony years earlier, Smith testified repeatedly that Cobb had been authorized by the United States Attorney to characterize the $10,000 payment as an attorney's fee. J.A. at 1563-64, 1569, 1582-83 (testimony of Smith). He also testified repeatedly that Cobb was refusing to characterize the payment truthfully absent permission to do so from Lindsay. J.A. at 1565-66, 1569, 1583 (testimony of Smith). Cobb, too, in his testimony during the same hearing, suggested that someone in the United States Attorney's Office had told him that he could characterize the payment as a legal fee. J.A. at 1617-19, 1637-41.

Based upon the latter testimony of Smith, which the district court viewed as consistent with Smith's February 1991 testimony, and of Cobb, the district court stated that Smith's testimony

> indicates that SA Clemens, himself was not entirely truthful in his testimony at the hearing on February 27, 1991, when he described the purpose of the visit [of October 18] as one only to give information to Lindsay. Further, it indicates that Cobb also was not truthful in his testimony at the February 1991 hearing.

956 F. Supp. at 648. The court characterized as"shocking" both the involvement of Clemens in the early morning visit and the October 1995 testimony by Cobb that the United States Attorney had authorized him to call the $10,000 payment an "attorney's fee." *Id.*

As to Cobb's 1995 testimony about the payment characterization, the district court expressly declined to "make a specific finding as to Cobb's truthfulness," and therefore a finding as to whether United States Attorney Daniel authorized Cobb to term the payment an "attorney's fee." In fact, the district court said that it was "loath to give credence to Cobb's testimony over the statements of these prosecutors." *Id.* at 649. And, of course, not only did Smith repeatedly testify that Clemens had insisted that Cobb tell the truth about the payment, but Cobb never testified in any proceeding that the payment was an "attorney's fee." Therefore, there is no basis for concluding that the United States Attorney engaged in any wrongdoing in connection with Cobb's characterization of the $10,000 payment to Senator Lindsay.

As to Clemens' participation in the early morning visit to Smith's house and the telephone call to Senator Lindsay, the government admits that such was "unorthodox and, in

retrospect, ill-advised." Br. of United States at 96. But there is nothing to suggest that Clemens engaged in wrongdoing. Indeed, to the contrary, Smith, upon whose testimony the district court relied for the suggestion of wrongdoing, repeatedly testified that Clemens and Cobb had been arguing over whether Cobb would tell the truth–as Clemens insisted–or characterize the payment as a legal fee, and that Clemens, throughout the evening, had insisted that Cobb tell the full truth. J.A. at 912, 1583, 1588. Smith even said the following of Clemens:

> Q: Did you see Mike Clemens in any way at all that night act in an inappropriate way?
>
> A: No. I saw Mr. Clemens trying to perform in the most appropriate way.
>
> Q: And I believe that your opinion of Mike Clemens' actions on that night were all above–everything he was doing was aboveboard?
>
> A: My opinion of Mike Clemens that night and on every occasion I have ever met him are very high. He was trying–he was trying to set–and he was trying to make things the truth and right in the day's following testimony.

J.A. at 1589.

The district court did not even say what purpose Cobb's telephone call to Lindsay served other than the one identified by Cobb and Clemens. And there is clearly insufficient evidence from which to infer a purpose for Cobb's telephone call to Lindsay other than that to which Cobb and Clemens initially testified. Both Cobb and Clemens testified that the purpose was not to obtain permission from Lindsay to characterize the payment in a particular way, and, of course,

Smith was not a party to the telephone call, but only present in the room when the call occurred. *See, e.g.*, J.A. at 1569 (Smith noting that when Cobb was on the telephone with Lindsay "I was then talking to Agent Clemens over on the other side, so it was kind of out one ear and the other . . . ."). And obviously there is no basis for concluding that Clemens' testimony was necessarily false based upon Smith's 1995 testimony as to the purpose of the telephone call, because that testimony was based (if not upon the partial conversations he heard contemporaneously) upon Cobb's statements to Smith, not on the call itself. As the government notes, "if Smith's testimony was based on his conversation with Cobb, it does not show that Clemens testified falsely when he stated his own understanding regarding the 'purpose' of the call." Br. of United States at 97.

The only other possible basis for concluding that there was more to the telephone call than Clemens and Cobb testified is the district court's observation that "Lindsay was no stranger to publicity, and a notice to him that his name might appear in the media as a result of Cobb's testimony would certainly not warrant a telephone call to a dying man in the middle of the night." 956 F. Supp. at 648. However, not only is this the rawest of speculation, but we disagree with the district court that a call for the purpose stated by Clemens and Cobb would be out of the ordinary, given the close friendship between Cobb and Lindsay, the imminence of the public testimony, and the conceded condition of Senator Lindsay at the time.

C.

The district court inexplicably devoted a considerable portion of its order dismissing the indictments to its perception that the government had inadequately investigated allegations of bribery with respect to the State's capital gains legislation and had suborned grand jury perjury by Richard Greer, the former Chairman of the South Carolina Development Board, about the capital gains matter. These comments by the district

court about the capital g[illegible] investigation were entirely gratuitous, because that investigation was wholly unrelated to the Lost Trust investigation that led to the prosecution of the defendants in this case. Moreover, the court's conclusions as to both the adequacy of the Executive Branch's investigation into the capital gains bribery allegations and the alleged perjury were wholly without support in the record.

Upon receipt of information concerning corruption surrounding the State's capital gains deduction rollback, *see* J.A. at 2183 (5/1/89 FBI 302 recording Cobb's statement regarding "payoff" to Senator Jack Rogers through lobbyist Ken Kinard), J.A. at 2198 (9/25/89 FBI 302 stating that "Cobb advised that he had to pay off both JACK LINDSAY on the Senate side and JACK ROGERS on the House side"), J.A. at 2485 (9/11/90 FBI 302 reporting lobbyist Randy Lee's statement that he was "privy" to these efforts), the government began an investigation, headed by Agent Michael Morehart, a white collar crime specialist, into the allegations of bribery with respect to the capital gains legislation.[17] Greer and Senators

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[17]At the same time that the State was attempting to rollback the deduction so as not to deprive taxpayers of a deduction for capital gains realized in the first half of 1987, the State was *also* considering whether to lower South Carolina's capital gains tax, which was one of the highest in the country. In contrast to the "rollback" legislation discussed above, this prospective reduction was a priority of then-Governor Campbell and, as a consequence, of Greer, as chairman of the South Carolina Development Board. As discussed below, the only allegations of capital gains corruption were in connection with the retroactive"rollback" legislation–not with the prospective legislation–and there is no record evidence to support the district court's suggestion that either Greer or Governor Campbell was involved in that corruption or that the matter was inadequately investigated.

Lindsay and Rogers were the subjects of the investigation. Greer subsequently cooperated with the government, eventually testifying, on May 23, 1991, before a federal grand jury investigating the capital gains matter.

The district court volunteered the following as to the federal government's investigation of Greer in connection with the capital gains matter:

> The government's actions as outlined in this order suggest a total avoidance of pursuing information that might have proved adverse to Greer. . . . The government's failure to fully investigate Greer might be excused as falling within the province of the government's prosecutorial discretion if his alleged involvement was isolated. The fact that it surfaced in an investigation resulting in the convictions of these defendants and may have had an impact on the fairness of their trials puts the government's handling of Greer's involvement in an entirely different light.

956 F. Supp. at 660.

As an initial matter, the district court was without authority to comment upon the government's capital gains investigation. The case law is legend from the Supreme Court and the courts of appeals that the investigatory and prosecutorial function rests exclusively with the executive. *See, e.g., Wayte v. United States*, 470 U.S. 598, 607 (1985) ("Such factors as the strength of the case, the prosecution's general deterrence value, the Government's enforcement priorities, and the case's relationship to the Government's overall enforcement plan are not readily susceptible to the kind of analysis the courts are competent to undertake."); *Heckler v. Cheney*, 470 U.S. 821, 832 (1985) (noting that a prosecutor's decision not to

indict "has long been regarded as the special province of the executive Branch, inasmuch as it is the Executive who is charged by the Constitution to 'take Care that the Laws be faithfully executed.'"); *United States v. Giannattasio*, 979 F.2d 98, 100 (7th Cir. 1992) ("[a] judge in our system does not have the authority to tell prosecutors which crimes to prosecute or when to prosecute them"). As the Ninth Circuit has said,

> [i]t would raise serious separation of powers questions–as well as a host of virtually insurmountable practical problems–for the district court to inquire into and supervise the inner workings of the United States Attorney's Office.

United States v. Redondo-Lemos, 955 F.2d 1296, 1299 (9th Cir. 1992). But in this instance, judicial intrusion into the investigatory function of the Executive was even less defensible because the capital gains matter had absolutely nothing whatsoever to do with the Lost Trust investigations and trials that were pending before the district court. And certainly Richard Greer had nothing to do with the Lost Trust investigation or trials. The capital gains matter was a separate investigation of events that occurred two years earlier, which was supervised by different personnel than those assigned to the Lost Trust investigation. The district court's comments, thus, were gratuitous to the cases before it, and its unsupported suggestion that the government's failure to adequately investigate the capital gains matter "may have had an impact on the fairness of [defendants'] trials," 956 F. Supp. at 660, was without basis.

Even so, the district court was clearly in error that Greer had not been investigated. Although the district court noted none of the following, authority was sought from the outset of the federal government's investigation into the capital gains matter to surreptitiously record Greer's conversations with

cooperating witnesses. J.A. at 2505. Agent Morehart interviewed numerous individuals, including Gary Turner, Executive Director of the South Carolina Tax Commission, J.A. at 1691-92; Gail Kinard, Senator Rogers' secretary, J.A. at 1692; Senator Passailaigue, J.A. at 1693; Hunter Howard, Chairman of the South Carolina Tax Commission, J.A. at 1695; Senator John Mathews; Senator James Waddell, Jr.; Thomas Roe; Walter Brashier; and Otis Rawl, Director of Tax Research for the South Carolina Tax Commission, and Morehart received information from more persons still. Morehart analyzed bank records of Cobb and traced the money that was paid to Ken Kinard & Associates. J.A. at 1701-02.[18] A number of persons appeared before the federal grand jury, *see* J.A. at 2525-2641, including Morehart, J.A. at 1709, 2632-41, and, of course, Greer himself was interviewed several times and appeared before the grand jury, J.A. at 2583-2604. At the end of his investigation, and unmentioned by the district court, Morehart testified as follows:

> Q: Did you want to do more with the investigation?

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[18]A number of witnesses testified that Greer never took money in connection with the capital gains legislation, and the district court noted that the government strenuously asserted as much. 956 F. Supp. at 644. The district court nonetheless stated that "[t]here is nothing in the record to show that the government's 'active pursuit' of Greer included a review of Greer's financial records." *Id.* However, as the United States points out, "no one ever suggested that Greer profited personally from the capital gains matter . . . [and thus] it is unclear what basis the government would have had to undertake such a review." Br. of United States at 105 n.53; *see also* J.A. at 2111 (statement of defense witness Rhonda Collins that, to her knowledge, Greer did not receive any money in connection with the capital gains matter).

A: No, sir. I think I did a pretty comprehensive investigation.

Q: Do you remember that there were any leads you wanted to pursue that you couldn't?

A: No, sir, none.

Q: Were there any resources you wanted that you couldn't get?

A: I was adequately supplied.

Q: Did anyone ever ask you to keep the capital gains investigation away from the knowledge of other people?

A: No, sir.

J.A. at 1778. And, as a result of the investigation, Senator Rogers pled guilty, and the government planned, until his death, to prosecute Senator Lindsay. *See, e.g.*, Reply Br. of Prosecutors *Amici* at 12 (noting that "Lindsay's attorney had a plea agreement in hand at the time of Lindsay's death.").

Clearly, the district court overstepped its bounds, and in so doing erred, when it stated conclusorily that Greer had not been adequately investigated by the government.

Equally without record support is the district court's related assertion, without any citation whatsoever, that "the record is replete with implications that Greer was heavily involved in payoffs related to the capital gains tax bill," 956 F. Supp. at 660. In making this unsupported allegation, the district court appears simply to have accepted as true the initial allegations made by Randy Lee that prompted the investigation into Greer, despite the fact that the investigation that followed

disclosed nothing to suggest that Greer was, in fact, involved in any alleged payoffs. Indeed, Lee–whose initial allegations against Greer are the only suggestion in the record that Greer might have engaged in wrongdoing in connection with the capital gains matter–subsequently testified under oath post-trial that he was unaware of any wrongdoing by Greer regarding the capital gains legislation. As Lee himself explained, Lee knew only what Cobb had told him, which was that he (Cobb) had paid money to Rogers and Lindsay and that no one else, other than Ken Kinard, was involved. J.A. at 1878-79 (testimony of Lee).

Moreover, this later testimony by Lee also makes clear that the district court's concomitant intimation that Governor Campbell was involved in wrongdoing in connection with the capital gains legislation, *see* 956 F. Supp. at 640, 642, is likewise lacking in record support. As was the case with Greer, Lee was the only person whose testimony might even arguably be read as implicating Governor Campbell in the alleged capital gains bribery. And the only allegations of capital gains corruption of which Lee was aware were Cobb's allegations of payments to *Lindsay* and *Rogers* in connection with the *retroactive* legislation. *See, e.g.*, J.A. at 2183 (Cobb's description of his payments to Lindsay and Rogers in connection with the "capital gains tax credit," *i.e.*, the retroactive"rollback" bill). Cobb never suggested any wrongdoing by Governor Campbell. And Lee explained in his subsequent testimony that he had mistakenly implicated Campbell in the capital gains wrongdoing because, at the time when he had originally spoken with the FBI, he had not been aware that there were two different bills in the legislature concerning the capital gains matter–the prospective legislation, which was a priority for the Campbell administration, and the

retroactive legislation, which was not. J.A. at 1878-81 (testimony of Lee).[19]

D.

No more supportable were the district court's suggestions that Richard Greer perjured himself before the grand jury and that the prosecutors suborned that perjury. Indeed, a simple reading of the grand jury testimony itself reveals that it is not even arguable that Greer was intentionally misleading the grand jurors.

As the district court noted, 956 F. Supp. at 643-44, Greer testified before the grand jury on May 23, 1991. During that testimony the following exchange occurred between Assistant United States Attorney Barton and Greer:

> Q: Were you aware of any monies paid to any legislators in effort (sic) to influence their vote

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[19]Likewise unsupported by the record is the district court's suggestion that Senator William Richard Lee's December 3, 1990, statement, through counsel, that he was present at a meeting in the spring or summer of 1988 with Governor Campbell and his staff where he was told that the capital gains legislation was "the most important legislation to the governor's office for this legislative year [and] [i]f anybody raises a question about it, you are to sweep it under the rug," 956 F. Supp. at 644, implicated Governor Campbell and Greer in wrongdoing. Senator Lee testified under oath post-trial that he did not know of or have any information as to any illegality by Governor Campbell with respect to the capital gains legislation. J.A. at 1666. In fact, Senator Lee testified that he never "had any information as to any illegal conduct by anybody regarding the capital gains bill." J.A. at 1666.

> in connection with the capital gains rollback bill?
>
> A: No.
>
> Q: How about in connection with the Governor's change, the bill that was his priority?
>
> A: Absolutely not.

J.A. at 2596-97. The district court seemed to believe that this testimony was perjurious because,

> [i]t is obvious from the government's argument for a downward departure for Greer that Greer had knowledge as early as December of 1990 that payoffs had been made by Cobb to Lindsay and Rogers. USA Daniel, who was present at the Christmas 1990 meeting, and who was, or should have been, privy to information given at other debriefings of Greer, was also present when AUSA Barton questioned Greer before the Grand Jury. Daniel did nothing to correct Greer's testimony that he was not aware of any illegal payoffs to legislators.

956 F. Supp. at 643; *see also id.* at 660 ("[Greer's] testimony before the Grand Jury would have to be perjured if the arguments advanced by the government at Greer's sentencing are true."); *id.* ("The court further finds that the government did, in fact, allow testimony from . . . Greer that it knew to be untrue to stand uncorrected.").

Again, as with the district court's remarks concerning the government's investigation of the unrelated capital gains matter, we are at a loss even to understand why the district

court was addressing itself to Greer's testimony before the grand jury investigating the capital gains matter. That matter, and Greer's testimony in connection with that matter, were peculiarly irrelevant to the Lost Trust matter which was pending before the district court.

In any event, it is painfully clear that the district court simply, and clearly, erred in its charge of perjury against Greer, and therefore also in its related charge of subornation of perjury by prosecutors Daniel and Barton. Greer was not asked by Barton "*Are* you aware of any monies paid to any legislators in effort (sic) to influence their vote in connection with the capital gains rollback bill?" Rather, he was asked "*Were* you aware of any monies paid to any legislators . . . ." The question, in context, if not also by its terms, elicited a response from Greer as to whether he knew of any such payments at or about the time they were made in 1988, not whether, as of the time of his testimony in 1991, he knew of such payments. This is not a "play with semantics," as the district court characterized it, *id.* at 643-44; these are different questions–and self-evidently so.

By the time of his grand jury testimony, Greer obviously knew of the payoffs to Rogers and Lindsay and was not in any way attempting to deceive the grand jury as to this knowledge. This is clear from his testimony only moments later in response to a question from a grand juror–testimony not mentioned by the district court–in which Greer explicitly distinguishes between his knowledge at the time of the payments and his later understanding:

> GRAND JUROR: Would you be surprised if you were told that several legislators were paid large sums of money out of the monies received from Mr. Roe and Mr. Brashier?

> GREER: Well, I think it–I would have been surprised at the time. Certainly in retrospect it would be kind of foolish not to be surprised.

J.A at 2603. As Greer subsequently explained under oath in October of 1995 when specifically asked about his grand jury testimony by defense counsel Lofton, and in response to further questioning in the same hearing, he answered the question put to him before the grand jury, which was whether, at the time of the bribes of Rogers and Lindsay, he was aware of any illegal payments of money in connection with the capital gains bill. J.A. at 1812-14, 1849-50, 1854-55. At the same time, he made clear to the grand jurors in the very same testimony that, although he was not aware of any bribes at or about the time that they occurred, he subsequently became aware of these illegal payments, as did everyone else in the community.[20] In

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[20]Greer's testimony is fully consistent with that of Special Agent Davis on July 31, 1991, at Greer's sentencing hearing. At that hearing, Davis testified:

> Your Honor, last Christmas the FBI approached Dick Greer for the first time in connection with our drug investigation of Mr. Greer. This was prior to the Jack Rogers' indictment. At that time, Mr. Greer provided us with information concerning the capital gains tax investigation. Mr. Greer essentially told us that lobbyist Ron Cobb had approached him and told him that he needed more money to payoff both Jack Rogers and Senator Jack Lindsay in connection with the capital gains tax bill. *He told us this is the first time that he knew what Ron Cobb–what he was doing was illegal.*

J.A. at 1074. The fact that the defendants omit the final

conclusion, the district court clearly erred in its "findings" of perjury by Richard Greer and subornation of that misperceived perjury by Daniel and Barton.

E.

In addition to suggesting that the government had suborned perjury by Greer, the district court also suggested in its order dismissing the indictments that the government had suborned perjury by Cobb and that Special Agent Clemens–and perhaps AUSA Barton–had themselves committed perjury before the court. Like the district court's suggestion that Greer perjured himself, these suggestions are without support in the record.

The district court relied on the defendants' allegation that the government allowed Cobb to commit perjury at Taylor's trial when he testified, without correction, that he had never given Senator Lindsay any "bribes or illegal money." 956 F. Supp. at 639-40. An examination of the record reveals, however, that Cobb consistently maintained that, although he had given money to Lindsay over the years, he did not believe those payments were bribes or were otherwise illegal because he did not think they were made in exchange for specific votes. Thus, while the FBI disagreed with Cobb's conclusion about the legality of his payments to Lindsay, *and repeatedly told him*

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italicized sentence from this testimony when they discuss the issue of Greer's alleged perjury, *see* Br. of Appellees at 70; *compare* 956 F. Supp. at 642-43 (district court quoting Davis' statement), all but confirms that even they understand that Greer's grand jury testimony, Davis' testimony, and the government's representations were all consistent. *See also* Br. of Appellees at 70 (conceding that Greer's testimony, if parsed, can be "plausibly characteriz[ed] . . . as literally true and therefore not perjurious").

and the court as much, it had no basis to question his (Cobb's) subjective belief concerning the payments or their legality.

During the Taylor trial, Cobb was asked on cross-examination whether he "had ever given bribes or illegal money to Senator Lindsay," and Cobb replied, "No, sir, I have not given Senator Lindsay any bribes or illegal money." *Id.* at 640. Cobb did not deny having made payments to Lindsay, but insisted that, in his view, the payments were not illegal bribes. Indeed, he admitted giving Lindsay "$10,000 all at one time," Br. of United States at 72 (quoting Taylor N.169 at 58), but denied that he thought, or had ever said, that the money was given "in exchange for [Lindsay's] vote or support for a bill for the South Carolina Oil Jobbers Association in 1985 or 1986." J.A. at 439.

This testimony by Cobb was perjurious only if he was misrepresenting his subjective belief as to the purpose and legality of the payments he made to Lindsay. It is, of course, difficult to prove that someone is lying about their subjective beliefs and perceptions. *See United States v. Ellis*, 121 F.3d 908 (4th Cir. 1997) (noting that an allegation of perjury as to a "matter of perception" fails "absen[t] conclusive proof" that the witness testified falsely as to her belief, rather than that she was merely mistaken in her subjective assessment of the facts). Moreover, the prosecutors in this case suborned perjury only if they actually knew that Cobb was testifying falsely about his subjective beliefs; absent such actual knowledge, the prosecutors did not suborn perjury, even if they suspected or had reason to suspect that Cobb was lying about his view of the payments' legality. *Hoke v. Netherland*, 92 F.3d 1350, 1360 (4th Cir. 1996).

Because Cobb consistently represented that his payments to Lindsay were not bribes, the prosecutors had no basis for questioning the veracity of Cobb's belief as to the payments' legality. Cobb's response to the questioning at

Taylor's trial was fully consistent with his position throughout the Lost Trust investigation and trials. Cobb always acknowledged that, over the years, he paid Lindsay money in connection with Lindsay's position as a member of the South Carolina Senate. *See* J.A. at 792 (Cobb testifying that Lindsay had "helped me throughout my entire career, and any time I could make some money and put some money his way, I did").

However, Cobb also adamantly and invariably maintained from the outset of the investigation that he never gave Lindsay money in exchange for a specific vote or any other specific official act. As Cobb explained: "I gave Senator Lindsay money at different intervals, I never gave Senator Lindsay any money for a specific vote. Because he helped me on anything that I was doing. When I was making money, is when I would pass some to him." J.A. at 802. Because Cobb did not believe that the money was given in exchange for a specific quid pro quo, Cobb consistently maintained that it was not a bribe. *See, e.g.*, J.A. at 804 ("[The money paid to Lindsay] was not a bribe, and at no time did I ever buy Senator Lindsay's vote, at no time did I ever bribe Senator Lindsay."); J.A. at 810 ("[Y]ou can quiz me until the Indians come home, but I'm not going to say I bought Senator Lindsay's vote, it didn't happen.").[21]

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[21] After being accused of perjuring himself in the Taylor trial, Cobb took care in the later trials to make clear that he did not believe the payments were bribes, but that the government disagreed. *See, e.g.*, J.A. at 881 ("I have been informed that from my vantage point that I–I didn't consider it a bribe, *from the prosecutor's vantage point, it could be labeled a bribe*." (emphasis added)); J.A. at 989 ("I didn't label [the $10,000 payment to Lindsay] a bribe . . . . I gave Senator Lindsay money at different times. *I am informed that it is a bribe*, but to me it was not a bribe.") (emphasis added). He never wavered from his position that he did not believe that the payments he made

Cobb thus consistently refused to implicate Lindsay in any wrongdoing, and he made it a condition of his cooperation with the FBI that his testimony not be used to incriminate Lindsay. The FBI and prosecutors, in contrast, made clear to Cobb–and to the district court–from the outset that they disagreed with Cobb's characterization of the payments to Lindsay, and that they intended to investigate Lindsay fully. *See, e.g.*, J.A. at 846, 881, 989-90. That investigation was ongoing when Lindsay died.

The government's disagreement with Cobb about the ultimate legality of the payments, of course, demonstrates neither that Cobb was, in fact, lying about his own view of the payments nor even that the government believed that he was lying. Certainly, that disagreement is not evidence that the government *knew* that Cobb was testifying untruthfully about his subjective belief as to the payments' legality. As Barton explained to the district court in 1991:

> Could I prosecute Jack Lindsay for that payment to Tom Magnum? I certainly could. I'm comfortable that I could do that. That doesn't mean that because I am convinced there is a case against Jack Lindsay that Ron Cobb has any understanding as to the illegality of what he did.

J.A. at 846; *see also* 956 F. Supp. at 640 (quoting affidavit of Special Agent Ronald L. Dick, which states that "Cobb would never allow the payments [he made] to state senator Jack Lindsay to be characterized as bribes. My position on this matter was similar tc the old saying that if it walks like a duck, talks like a duck, and looks like a duck, then it must be a duck. After listening to Cobb try to characterize the payments made

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were bribes.

to Lindsay as anything other than bribery, I remain unconvinced. As an FBI agent, it was clear to me that the monies paid to Lindsay by Cobb were in violation of the Hobbs Act. Cobb, however, would never allow these transactions to be characterized as bribes.").[22] *The district court itself recognized in a 1991 hearing that even if everyone involved in the case other than Cobb believed that his payments to Lindsay were bribes, that did not indicate that Cobb himself believed as much.* In response to defense counsel's allegation that Cobb had perjured himself, the court stated:

> THE COURT: Mr. Collins, that is what I am trying to tell you from the outset here when we got involved in this. You might think they are bribes and illegal money or whatever it is and I might think they are bribes and illegal money or whatever it was but Mr. Cobb stuck by the story from the outset. . . . [W]hat I am trying to tell you [is that Cobb] has always been consistent, they were gifts. He never denied that he didn't give [Lindsay] money . . . .

J.A. at 925.

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[22]The district court cites to this affidavit as confirming "the defendants' allegations that the government was totally aware of the nature of the Cobb payments to Lindsay." 956 F. Supp. at 640. The district court's reliance on the affidavit as suggesting that the prosecutor suborned perjury merely underscores that the court's 1997 order failed to focus on the critical difference between the government's objective disagreement with Cobb's assessment of the legality of the payments and the government's knowledge as to whether Cobb was misrepresenting his subjective beliefs about those payments.

Nevertheless, the district court concluded in its February 1997 order dismissing the indictments that Cobb had perjured himself. J.A. at 63-40, 660. And, while the district court failed to make a specific finding that the government knew that Cobb thought the payments were illegal, it apparently concluded that the government had suborned that perjury.[23]

Curiously, the arguments relied on by the district court in concluding that Cobb's testimony at the Taylor trial was, in fact, perjurious, were essentially the same arguments that it heard, considered, and apparently rejected in February of 1991, when the allegation of Cobb's perjury first surfaced. J.A. at 877 (denying defendants' motion to dismiss). During their trial, Blanding and Gordon moved to dismiss their indictment, alleging, in part, that Cobb had perjured himself at Taylor's trial

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[23]The district court concluded that the prosecution "was totally aware of the nature of the Cobb payments to Lindsay," 956 F. Supp. at 634, but allowed this perjured testimony to stand uncorrected. As discussed above, the fact that the prosecution was aware of the facts surrounding Cobb's payments to Lindsay and believed that the payments were probably illegal, is not a sufficient basis for concluding that the prosecution suborned perjury. In the final section of its opinion, the district court also included a conclusory statement that "[t]he court further finds that the government did, in fact, allow testimony from Cobb, Clemens and Greer that it knew to be untrue to stand uncorrected." *Id.* at 660. This general statement–made without any record support and without identifying which alleged perjury was being referenced–cannot fairly be viewed as a finding that the government knew that Cobb was misrepresenting his *subjective* belief about the nature of his payments to Lindsay, particularly in light of the court's manifest failure in its 1997 order to appreciate the crucial difference between the objective legality of Cobb's payments and his subjective view of their legality.

when he denied paying"bribes or illegal money" to Lindsay. J.A. at 606-10. The district court held a detailed and lengthy evidentiary hearing on that motion, and, the following day, denied the motion to dismiss and rejected the defendants' request that Cobb be precluded from testifying at their trials because of his alleged "perjury" at Taylor's trial. 956 F. Supp. at 628.[24]

The district court abruptly reversed course in its February 1997 order. In that order, the district court concluded that Cobb had perjured himself and that the government had suborned that perjury because "[t]he evidence now shows" that 1) Cobb "discussed payoffs in connection with the capital gains tax bill with SA Clemens, with Greer, and in the presence of Randy Lee, all of whom knew that the Cobb payments to Lindsay were, in fact, illegal;" and 2) that Cobb "admitted to SA Richards on May 1, 1989, that he paid $20,000 in illegal monies to Lindsay and Magnum for their influence in passing the oil jobbers bill," and that Richards' polygraph of Cobb confirmed as much. 956 F. Supp. at 640. Despite the district court's intimation that the state of the evidence had changed substantially since its February 1991 hearing on the issue, the basic arguments on which its 1997 ruling were based were rejected by the district court in 1991 and properly so.

The district court's first observation in its 1997 opinion that Cobb discussed "payoffs" to Lindsay with Special Agent Clemens (and others outside the United States government such as Greer) who knew of the payments' illegality demonstrates only that the government knew that Cobb had made payments to Lindsay and that the government believed that those payments were illegal under the Hobbs Act. The government

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[24]Two months later, the district court again rejected the defendants' claims of perjury because "[Cobb] sticks by the same story everywhere he goes." J.A. at 919.

has never contested either of these conclusions. As discussed above, that belief by the government demonstrates neither that Cobb was lying about his subjective belief about the payments nor that the government believed that he was.

The district court also appears to have concluded that Cobb actually characterized his payments to Lindsay as illegal payoffs when he described the payments to Special Agent Clemens. In support of that conclusion, the district court cites to a September 25, 1989, FBI 302 of an interview of Cobb by Special Agent Clemens, "in which the payments to Lindsay by Cobb . . . were characterized as 'payoffs.'" *Id.* at 639. However, the fact that the FBI 302 characterizes the payments to Lindsay as "payoffs" does not mean that Cobb himself so characterized the payments. The words recorded in the FBI 302 are the FBI agent's characterization of what Cobb said, not the words that Cobb actually spoke. FBI 302s are "routinely prepared" merely as "the agent's personal summary of the interview to serve to refresh his memory in later preparing a written report of the investigation," *United States v. Peterson*, 524 F.2d 167, 175 & n.11 (4th Cir. 1975), and are not intended to be verbatim recitations of the interviewee's statements.

Nothing in the Clemens 302 of Cobb indicates that Clemens was attempting to recite verbatim the words that Cobb himself spoke. Rather, Special Agent Clemens–who believed that the money Cobb gave to Lindsay was an illegal payoff regardless of Cobb's characterization of the payments– recorded Cobb's statements from his own perspective and thus used the word "payoffs"–with its attendant connotations of illegality–to characterize Cobb's payments to Lindsay. Indeed, when interviewed by OPR, Clemens explained that he thought the term "payoff" in the 302 was "more my [Clemens'] term." J.A.

at 2739.[25] Even more significantly, the district court itself earlier recognized the crucial distinction between an agent's characterization of what Cobb said and what Cobb actually said and rejected the defense argument that Cobb had necessarily spoken words recorded in the 302s. J.A. at 927; *see also* J.A. at 757 (district court at the 1991 evidentiary hearing describing the defense perjury argument as resting on the apparent "conflict in [Cobb's] testimony, and what he told these agents, *or what these agents reduced to writing in these 302's*" (emphasis added)). This same logic makes clear that Special Agent Clemens' use of the term "payoff" in his September 25, 1989, FBI 302 does not demonstrate that Cobb called the Lindsay payments a payoff or otherwise believed that they were illegal.[26]

The district court also relied on an interview and polygraph of Cobb, which was conducted by Special Agent Richards, in concluding that Cobb's testimony was perjurious. According to Richards' notes of that May 1, 1989, interview, Cobb "asked Senator Lindsay what it would take to obtain Representative Magnum's vote, and Senator Lindsay told him $20,000, $10,000 of which would be for Representative Magnum and $10,000 for him (Senator Lindsay)." J.A. at 2181 (May 1, 1989, FBI 302 of Ron Cobb). As with the FBI 302s discussed above, however, these notes reflect Agent Richards'

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[25]Additionally, Clemens' rough notes for this 302 do not contain the word "pay-off" in the portion dealing with Lindsay's involvement in the capital gains matter. J.A. at 2740 n.20.

[26]The identical analysis also applies to the other documents– mainly FBI internal teletypes–cited by defendants in their brief. *See* Appellees' Brief at 59-60. These documents did not purport to recite verbatim Cobb's own description of the payments he made to Lindsay, but rather reflected the FBI's assessment of those payments.

characterization of Cobb's testimony, rather than Cobb's own view about the purpose of the payment to Lindsay. No one disputes that Cobb told Richards during the interview and polygraph that he had paid $10,000 to Representative Magnum in exchange for Magnum's vote on the Oil Jobbers Bill, that Senator Lindsay acted as an intermediary for that payment, and that, at the same time that he gave Lindsay $10,000 to give to Magnum, he gave Lindsay $10,000 to keep. However, when Special Agent Richards was specifically questioned at the February 1991 evidentiary hearing about how Cobb had described the purpose of the $10,000 payment to Lindsay, Richards admitted that although *he* understood that the $10,000 payment to Lindsay was for "getting Representative Magnum's vote," J.A. at 781, Cobb did not indicate to Richard that that was the purpose of the payment, *id.* And, in fact, Richard testified that the purpose of the payment to Lindsay was not discussed at all. *Id.* Indeed, when asked whether he believed that Cobb knew he was making illegal payoffs to Lindsay, Richard replied that, while he had explained the Hobbs Act to Cobb at the beginning of the interview and he and Cobb were "talking about payoffs" in the interview generally, J.A. at 787, he "obviously . . . c[ould]n't say what is in a guy's mind," *id.*

In his testimony at the February 1991 evidentiary hearing Cobb denied that the $10,000 payment was in exchange for Lindsay's securing Magnum's vote and confirmed that he and Richards had not discussed the purpose of the payment to Lindsay. J.A. at 791-92. When pressed about how he would characterize his payment to Lindsay, Cobb described it as a "gift," J.A. at 793, and contrasted it with the $10,000 payment he made to Magnum to buy Magnum's vote, J.A. at 794.

After receiving all of this testimony and hearing argument from the defense, the district court itself was unable to conclude that Cobb had perjured himself, stating that while "it would be farfetched to believe all that we have heard here this afternoon, . . . I don't know that it's that crime of perjury

that we are talking about." J.A. at 843. Thus, the district court correctly concluded that while Cobb's testimony was, without any question, "farfetched," there is simply no evidence in the record that he was lying about his subjective belief as to the legality and purpose of his payments to Lindsay. The district court's February 1997 opinion fails to explain why, at that late date, the court concluded otherwise–and the record does not support the conclusion ultimately reached by the court.[27]

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[27]At the 1991 evidentiary hearing the court also heard and considered the fact that Cobb initially failed a polygraph examination given by Richards during the interview regarding the Oil Jobbers bill. In that examination, Cobb was asked whether he had paid Senator Magnum $10,000 through an intermediary. Cobb failed the polygraph until he revealed that Lindsay was the intermediary for the payment to Magnum. 956 F. Supp. at 638. In its order dismissing the indictments, the district court concluded, contrary to its implicit conclusion in 1991, that "[t]his [fact] alone refutes the government's argument that 'Cobb has consistently adhered to his subjective view of the facts during the investigation.'" *Id.*

The fact that Cobb failed the polygraph test when he was concealing the fact that Lindsay served as his intermediary in paying Senator Magnum does not establish, however, that Cobb believed that he had bribed Lindsay. Cobb was not asked during the polygraph whether he had made an illegal payment or bribe to Lindsay; "[t]he issue that [Richard] polygraphed [Cobb] on was whether or not he in fact paid Representative Mangum [sic] the $10,000 through the intermediary." J.A. at 778. As Richard explained, Cobb initially failed the polygraph ("showed deception"), not because he refused to admit that he had paid Lindsay an illegal bribe, but because he failed to divulge that Lindsay had acted as an intermediary in the payment to Magnum, and that withholding of information registered on the polygraph.

F.

In addition to the allegations that the government had suborned perjury by Cobb about Lindsay's involvement in the capital gains matter, the district court also suggested that Special Agent Clemens, and perhaps Assistant United States Attorney Barton, had perjured themselves by denying the existence of an FBI 302 of Cobb discussing the capital gains matter. 956 F. Supp. at 639-40. At the time of the Gordon/Blanding trial, defense counsel asked the government for any 302 about Cobb's involvement in the capital gains matter. Special Agent Clemens testified at the 1991 evidentiary hearing that he did not do an FBI 302 of any interview with Cobb about the capital gains matter and that he did not have any rough notes of such a discussion. J.A. at 836-37. AUSA Barton also told the court that no secret Cobb 302 discussing Lindsay's involvement in the capital gains matter existed that had not been turned over to the defense. J.A. at 657 ("[I]f he's looking for the secret 302 of Ron Cobb where this is discussed, it does not exist. There is no such 302 concerning that . . ."). The government concedes that these statements by Clemens and Barton were, in fact, incorrect. Br. of United States at 81-82. The September 25, 1989, Clemens FBI 302 of Cobb, discussed above, included one paragraph addressing the capital gains matter, and that 302 was not made available to defendants until 1993, after the cases were remanded for retrial. The government contends, however, that neither Clemens nor Barton intentionally misled the court.

The district court did not specifically find that either Clemens or Barton intentionally misrepresented that the FBI 302 did not exist, and we believe that the record does not support the defendants' charges of deliberate misconduct. Instead, the evidence suggests that the misstatements by

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J.A. at 779.

Clemens were the result of oversight, disorganization, and forgetfulness and that Barton never saw the FBI 302 at the time of the original trials. Our conclusion is bolstered by the report of the internal investigation by the Office of Professional Responsibility, which also found that there was no evidence that either Clemens or Barton intentionally misled the court. J.A. at 2742 ("On the central allegation of intentional concealment by the prosecutors, we find the evidence insufficient to support it."); J.A. at 2749 ("[O]ur investigation has developed no evidence that there was any intentional misleading of the court or of the defendant . . . .").

Agent Clemens explained in his OPR interview that he never viewed the FBI 302 as having "any particular significance," J.A. at 2734, and that he "forgot it ever existed," J.A. at 2737. Moreover, Clemens indicated that he was "shocked" when he learned of the 302's existence and that his misstatements to the court were "extraordinarily embarrassing" to him. J.A. at 2738. The district court was apparently skeptical of Clemens' explanation for his misstatements because Lindsay was a "big fish" in South Carolina politics and any suggestion that he was involved in corruption was "explosive" and not likely to be forgotten. 956 F. Supp. at 640. However, as Clemens explained, he knew of Cobb's allegations about Lindsay's involvement in the capital gains matter well before September of 1989 and thus the few isolated statements about the matter in the September 25, 1989, FBI 302 (which focused largely on other matters) could reasonably have slipped his mind. Clemens did not claim that he forgot about Lindsay's alleged involvement in the capital gains matter altogether, but rather only that he forgot that there was a September 1989 FBI 302 that mentioned Lindsay's involvement. Moreover, Clemens indicated that in September of 1989 he was preoccupied with the logistics of the sting operation, J.A. at 2734, and that he did not consider his conversation with Cobb about the capital gains investigation important because the information Cobb provided about Lindsay's connection to the capital gains matter related

"only [to] a historical case that we would look at eventually." J.A. at 2738.

As to AUSA Barton, the district court stated only that "AUSA Barton was handling the discovery for the Taylor trial, and any FBI 302 mentioning [inter alia, the capital gains related payment to Senator Lindsay] would certainly have been noticed by him, yet he denied the existence of the 'secret 302.'" 956 F. Supp. at 641. Obviously, however, Barton would only have noticed the FBI 302 if it was provided to the prosecutors, and thus any finding of deliberate concealment is necessarily predicated on the assumption that Clemens transmitted the FBI 302 to the prosecutors. Such an assumption cannot be sustained on this record. All record evidence indicates that Clemens did not provide the FBI 302 to the prosecutors until after the trials in question. Clemens himself indicated that he probably was not passing along to the AUSAs what Cobb was saying in the Fall of 1989 because Clemens was so busy with the details of the undercover operation. J.A. at 2734. And none of the prosecutors recalls having seen the FBI 302 at the time of the original trials. J.A. at 2742. As the OPR report summarized the evidence:

> Neither SA Clemens nor anyone else from the FBI claimed to have transmitted [the September 25, 1989, 302 or the June 22, 1989, 302] to the USAO, and no one in the USAO remembers having seen [the 302s] during the time that discovery was being given in the Taylor and Blanding/Gordon/Derrick cases. In particular, as for the September 25, 1989 302, none of the prosecutors involved–AUSA Barton, DuTremble, Daniel, Lydon and Schools– recalled having see it at least while the first several Lost Trust cases were being tried.

J.A. at 2742.

The district court never specifically addressed whether AUSA Barton (or any of the other prosecutors) had received the FBI 302 prior to the trials. The district court does cite to an August 28, 1990, FBI internal teletype, which the court apparently believed suggests that AUSA Barton knew of the FBI 302 in question. The teletype, sent from FBI-Columbia to FBI-Headquarters, requested authority for lobbyist Randy Lee to use electronic recording devices to monitor his conversations with Greer and stated, in part:

> Three CWs hereafter referred to as CW-1 [Lobbyist Lee], CW-2 [Senator Lee] and CW-3 [Cobb] have provided information that bribe payments were made to South Carolina State Representative John Irby Rogers, III, and South Carolina State Senator John Charles Lindsay, in order to ensure the passage of certain capital gains tax legislation in the State of S.C. during the 1988-89 legislative session.

J.A. at 2505. The last page of the teletype also recited that

> ASSISTANT UNITED STATES ATTORNEY John Barton is aware of the facts of this case and fully concurs with the use of consensual monitoring. Entrapment is not an issue based upon the facts obtained thus far.

J.A. at 2508. Of course, one cannot reasonably infer from the fact that AUSA Barton was aware of the "facts" of the capital gains matter that he also knew of the existence of a particular

FBI 302 discussing that matter.[28] *See* OPR Report, J.A. at 2745 ("[W]e find that there is insufficient evidence to show that any prosecutor even knew that [the 302] existed at the time discovery was provided in the first two trials.");[29] *cf.* Appellees'

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[28]Defendants also cite to two other documents, not relied on by the district court, which they claim indicate that Barton knew of the existence of the FBI 302. *See* Appellees' Brief at 75. However, both of these documents–like the FBI teletype discussed above–indicate, at most, that Barton was aware of Lindsay's involvement in the capital gains matter. Nothing in either document suggests an awareness of a particular FBI document discussing the matter.

[29]The district court also criticizes the government for providing Taylor with redacted versions of the May 1, 1989, Cobb 302 and the August 14-21, 1990, Lee 302. 956 F. Supp. at 640. This criticism is particularly unconvincing in light of the fact that the government redacted the FBI 302s with the knowledge and express approval of the district court. Taylor specifically challenged the redactions to the May 1, 1989, Cobb FBI 302 prior to his trial, and the district court sustained the government's decision to redact the 302. J.A. at 384. After the conclusion of Taylor's trial, the court again rejected counsel's claim that the redaction of the FBI 302 violated *Brady*. The court explained:

> You have to take that argument somewhere else because I don't buy that. They have been redacting things. You probably did when you were an Assistant U.S. Attorney. Nobody ever turned ongoing investigations over to the other lawyer or to the jury or to the public or anybody. I have and I protect innocent people, too, if they are out there.

Brief at 77 (arguing not that Barton had personal knowledge of the FBI 302 at issue, but only that"[h]e *knew all about capital gains* and had a duty as an officer of the Court to be honest" (emphasis added)).

* * *

We are, as we intimated at the outset of our discussion, reluctant to criticize the district court for its errors, even though we consider them numerous. For, we appreciate well that the countless proceedings leading up to this appeal have spanned the better part of a decade, that the documents generated in connection with this sprawling, multiple-defendant litigation are massive in number, and that the discovery process was oppressive and time-consuming for the court, and would have been so even if the court had confined discovery to that evidence to which defendants were legally entitled. This kind of protracted, zealously prosecuted and defended, record-intensive litigation would challenge the most encyclopedic of minds and try the patience of even the most tolerant. Indeed, both the prosecutors and the defense counsel themselves have had difficulty achieving a command of the voluminous documents generated and produced and reigning in their own understandable frustrations. This said, however, it still falls to this court to ensure that the law is respected. And, for the specific reasons articulated, we find ourselves of the firm conviction that the district court's assertions of intentional misconduct by the government and its prosecutors are simply unsupported by the record before the court, and, accordingly, that the district court clearly erred in its conclusion that the United States engaged in "egregious misconduct" in the trials of these defendants.

J.A. at 936. The court's February 1997 order dismissing the indictments does not even attempt to explain the court's about-face on this issue.

IV.

The order of the district court dismissing defendants' indictments is vacated and the case is remanded with instructions to the district court to reinstate the indictments and allow retrial of the defendants by the United States.

VACATED AND REMANDED

WIDENER, Circuit Judge, concurring:

I concur in the opinion of the panel.

I concur in that opinion because I think it is of some consequence that there be an opinion of the court instead of merely majority and concurring opinions, and more especially because the parties have requested our review of the record.

I would add a word, however. Left to my own devices, I am of opinion that the action of the district court, in its examination and criticism *in this case* of the government's handling of the similar but unrelated investigation of the capital gains tax legislation, was so far beyond its warrant that I would have vacated all of those findings for that reason without further consideration.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA
COLUMBIA DIVISION

UNITED STATES OF AMERICA	) CRIMINAL NO.
	) 3:90-00339
vs.	) AND 3:90-00434
	)
LUTHER LANGFORD TAYLOR,	)
LARRY BLANDING and	)
BENJAMIN J. GORDON, JR.,	)
also known as B. J. Gordon	)

UNITED STATES OF AMERICA	) CRIMINAL NO.
	) 3:91-00091
vs.	)
	)
PAUL WAYNE DERRICK	)

UNITED STATES OF AMERICA	) CRIMINAL NO.
	) 3:91-00384
vs.	)
	)
JEFFERSON MARION LONG, JR.	)

ORDER

This matter is before the court on motions to dismiss the superseding indictment against defendants LUTHER LANGFORD TAYLOR, LARRY BLANDING and BENJAMIN J. GORDON, JR., and the indictments against defendants PAUL WAYNE DERRICK and JEFFERSON MARION LONG, JR., on the grounds of prosecutorial, agency and/or investigative misconduct. Each defendant in these cases

has joined in the motions of the other defendants. All of these defendants are back before this court for retrials on remand from the Fourth Circuit Court of Appeals.

The court has reviewed each of the motions, the memorandums in support of and in opposition thereto, the transcripts of the various hearings, and the numerous exhibits attached to the memorandums and filed with the court in support of oral arguments.[1] The court is convinced that the totality of the government's actions in these matters rises to the level of egregious prosecutorial misconduct, and that this is a sufficient finding on which the court can exercise its supervisory power.

A tedious analysis of the case law has not provided any clear standards or guidelines for the dismissal of indictments when the government has been found guilty of misconduct. It does appear to be clearly established that the dismissal of an indictment is a drastic step; however, the court believes it has the discretion under the doctrine of the court's supervisory power to dismiss should it find the government's actions so outrageous as to offend the sensibilities of the court.

The government would argue that in using its supervisory power the court must find pattern and prejudice, and that the defendants have proven neither. The court agrees that the circuits are in disarray on this subject, but believes there is sufficient precedent to dismiss the subject indictments without addressing these issues. A fuller discussion of its authority under the supervisory power doctrine will be found at the conclusion of this order.

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[1]The court has also sought to develop some of the issues by reviewing other documents on record in the evidence room.

I have wrestled with some sanction short of dismissal, but find that the only remedy available to these defendants that would be commensurate with the misconduct of the government is in the dismissal of these indictments. I am of the opinion that the nature and breadth of its misconduct is indicative of the drastic steps the prosecution took to win these cases, and that the resultant injustice to these defendants cannot be fully remedied by new trials. Therefore, the court must take the equally drastic step of invoking its supervisory power to dismiss these indictments with prejudice.

I. PROCEDURAL HISTORY

These cases arise from an FBI investigation of drugs and corruption in the South Carolina State House, code-named "OPERATION LOST TRUST," that eventually involved some twenty-eight State legislators, lobbyists and others. In early 1988, Special Agent Michael S. Clemens of the Federal Bureau of Investigation's Columbia, South Carolina, office, commenced an investigation of drug violations by members of the South Carolina State Legislature. On April 28, 1989, a registered South Carolina lobbyist, Ronald L. Cobb, was apprehended by the FBI after attempting to invest in a drug deal with an undercover agent. When approached by Clemens and other FBI agents, Cobb, realizing he had been caught in the commission of a felony, told the agents he could help them with a far more serious problem—political corruption in the State House. The FBI was in possession of some historical evidence of political corruption in the State House at that time, but had never developed sufficient evidence to indict any legislators or lobbyists. Cobb was given the opportunity to avoid prosecution for the drug deal in exchange for becoming a paid confidential informant.

Over the next several months, the details of a sting operation were developed with Cobb's assistance. It was ultimately determined to utilize a pari-mutuel betting bill then

before the legislature; to set Cobb up as the lobbyist for a bogus corporation known as The Alpha Group, and to have Cobb let it be known that he had funds available for those legislators who would assist him in the passage of this legislation. The resulting corruption charges of Conspiracy to Commit Extortion under Color of Official Right and Extortion under Color of Official Right against these and some of the other defendants were brought pursuant to the Hobbs Act, Title 18, United States Code Section 1951. Other defendants were indicted on drug charges pursuant to various sections of Title 21, United States Code.

On August 24, 1990, the first of the criminal indictments, No. 3:90-339, was returned against defendant LUTHER LANGFORD TAYLOR, a member of the S.C. House of Representatives, charging him with one count of conspiracy to commit extortion and five substantive counts of extortion, and ROBERT ALFRED KOHN, also a member of the S.C. House, charging him in the conspiracy count. Kohn pled guilty on September 26, 1990.

On September 19, 1990, Taylor[2] filed a motion to dismiss the indictment on the grounds of prosecutorial, agency and/or investigative misconduct, which was heard and taken under advisement on September 24, 1990. A supporting memorandum was filed on October 1, 1990; the government filed its opposition on October 4th, and the motion was denied by this court on October 9, 1990. On October 15, 1990, the trial of Taylor commenced, and on October 25th he was found guilty on all six counts of the indictment. Taylor's post-trial motions were denied, and he was sentenced to seventy-eight

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[2]In the interest of brevity and continuity, the designations of the defendants by their surnames are used to denote the defendants personally and, where appropriate, to denote the defendants by and through their attorneys.

months on each of the six counts, the said sentences to run concurrently. Taylor appealed his conviction. Bond pending appeal, vigorously opposed by the government, was denied.

During this time, on September 21, 1990, a six-count indictment, No. 3:90-434, was returned against Ennis Maurice Fant, Larry Blanding and Benjamin J. Gordon, also members of the State House of Representatives. These defendants, likewise, filed a joint motion to dismiss for prosecutorial misconduct on November 7, 1990, to which the government responded on November 15, 1990. The motion was denied at a hearing on November 19, 1990. Fant pled guilty to the conspiracy count of the indictment on February 22, 1991, and trial proceeded as to Blanding and Gordon on February 25, 1991. On the first day of trial Gordon filed another motion to dismiss for prosecutorial misconduct, which was denied. Guilty verdicts as to both defendants were returned on March 7, 1991. After two hearings, their motions for acquittal and new trial were denied on August 7, 1991. Blanding was sentenced the following month to thirty-seven months each on the conspiracy count and two substantive counts of extortion, said sentences to run concurrently, and remained on bond until he commenced serving his sentence upon designation by the Bureau of Prisons. Defendant Gordon's sentencing on one count of conspiracy and one substantive count of extortion was postponed as the result of contested legal issues relating to sentencing and, subsequently, the defendant's health. Both defendants appealed their convictions.

Defendant Paul Wayne Derrick was indicted on February 20, 1991, by a two-count criminal indictment charging conspiracy to commit extortion and extortion under color of official right, # 3:91-0091, and went to trial on May 1, 1991. On May 11th he was found guilty on both counts and was sentenced to thirty-four months on each count, said sentences to run concurrently. Derrick appealed this conviction and has remained free on bond.

Defendant Jefferson Marion Long, Jr. was a member of the South Carolina Senate who was indicted in a two-count Indictment, # 3:91-0394, charging conspiracy to commit extortion and extortion under color of official right, on August 20, 1991. Trial commenced on November 12th; his motion for a directed verdict was granted as to Count 1 on November 22nd, and the jury returned a guilty verdict as to Count 2 on November 23, 1991. On March 26, 1992, this court granted this defendant's motion for a new trial, which order was appealed by the government. Long has since remained free on bond.

The Fourth Circuit Court of Appeals found that the jury charge given in the Taylor, Blanding and Gordon, and Derrick cases, to be in conflict with the subsequent holdings in *McCormick v. United States*, 111 S. Ct. 1807 (1991) (on the issue of quid pro quo), and *Evans v. United States*, 112 S. Ct. 1881 (1992) (on the issue of inducement), and remanded these three cases for re-trial. *See*, *USA v. Taylor*, 966 F.2d 830 (4th Cir. 1992), *aff'd on reh'g*, 993 F.2d 382 (1993), and *cert. denied*, 510 U.S. 891 (1993); *USA v. Blanding*, No. 91-5871; 1992 WL 138353 (4th Cir. June 22, 1992); and *USA v. Derrick*, No. 92-5084; 1994 WL 34691 (4th Cir. Feb. 7, 1994). In another unpublished opinion, the Fourth Circuit Court of Appeals affirmed this court's decision granting a new trial in *USA v. Long*, No. 92-6799; 1994 WL 56993 (4th Cir. Feb. 25, 1994). Following remand, both Taylor and Blanding were released on bond. This court then granted Gordon a new trial on August 6, 1993.[3]

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[3]Three other defendants indicted as a result of the Operation Lost Trust investigation went to trial on Hobbs Act charges. The convictions of two of these defendants were upheld by the Appeals Court; the third was found not guilty. All other Lost Trust defendants pleaded to either corruption or drug charges.

On July 1, 1993, this court issued an order for a statewide jury to be selected on August 16, 1993, in the retrial of Taylor. By order of August 2, 1993, trial was continued to November 8, 1993. On August 18, 1993, the government filed a Superseding Indictment which consolidated the Taylor case with the Gordon and Blanding case.

Taylor filed on September 29, 1993, the motion now still pending before this court to dismiss the superseding indictment on grounds of double jeopardy, claiming prosecutorial and/or agency misconduct, which motion the government opposed on October 6, 1993. On October 19, 1993, the trial of the three defendants was continued to December 6, 1993, principally due to Gordon's health. Again on October 26, 1993, the trial was continued to the first available term following January 1, 1994. On November 29, 1993, however, the defendants received volumes of discovery material not previously furnished them by the government.[4] As a result, Taylor filed several supplemental *Brady* motions, and on February 20, 1994, he filed a supplemental memorandum in further support of his dismissal motion. Gordon filed his motion to dismiss on February 22, 1994.[5]

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[4]The record subsequently shows that the government made a decision to "start over on discovery by providing it again." [DOJ/OPR Report, 10/18/4, p. 10].

[5]Derrick also filed a separate motion to dismiss on grounds of prosecutorial misconduct and entrapment on April 19, 1995, which he supplemented on September 5, 1995. The government filed its opposition on September 27, 1995. In the summer of 1996, Derrick requested consideration of this motion without oral argument *on the issue of entrapment only*, and dismissal on this ground was denied by this court's order of August 7, 1996.

At this point, the United States Attorney for the District of South Carolina[6] sought an order of continuance and requested an investigation by the Department of Justice's Office of Professional Responsibility (DOJ/OPR).[7] On October 19, 1994, the U. S. Attorney for South Carolina recused his office from any further involvement in the cases, and attorneys from the Public Integrity Section of the Department of Justice were assigned as substitute counsel for the government.

On October 20, 1994, a status conference was held on the within cases. Each defendant joined in the motions of the others, and discovery was consolidated with regard to the motions only. The court established an "Evidence Room"

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[6]Upon Daniel's resignation as United States Attorney, John S. Simmons was appointed in early 1992 to that post. Upon Simmons' resignation effective in April of 1993, Margaret B. Seymour was appointed Interim U. S. Attorney, followed by the interim appointment of J. Preston Strom in May 1993. Strom's "permanent" appointment became effective July 30, 1993.

[7]The reports of the DOJ/OPR and FBI/OPR dated October 18, 1994, December 6, 1994, and February 16, 1995 [Hearing 4/19/95, Defendants Exhibits 30, 45 and 44 respectively] will be discussed later in this order.

wherein the government[8] was ordered to place all discovery materials and make them available to these defendants.[9]

The defendants continued to file motions for additional discovery, and a hearing on Taylor's and Gordon's discovery motions filed March 15 and 17, 1995, was held in Columbia on April 19, 1995. This hearing resulted in the court issuing an order filed April 20, 1995, which stated in part:

> To avoid any further confusion as to what material should and should not be turned over by the government to the above defendants, it is
>
> ORDERED, that all documents and/or materials in possession of the government dealing with these cases and not presently

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[8]The disclosure of discovery to defendants is primarily the responsibility of the USAO. Unless so distinguished, however, subsequent references herein to "the government" include all of the government agencies involved in the investigation and prosecution of these cases. In the eyes of the court there is no difference. Those indicted for crimes have a right to look to only one body—the government—for due process and a fair trial. One agency cannot point its finger at another, declaring "it's their fault—it's not our fault." It is the United States, represented by the United States Attorney, that is seeking redress; and, if a defendant does not receive a fair trial because of the failure of any one agency, that failure must be impugned to the government as a whole.

[9]From this period on, the court conducted numerous *in camera* inspections of discovery materials at the request of the government. All documents ordered to be turned over to the defendants were done so under protective orders.

> available to the defendants in the "evidence room" be produced by the government directly to the court at Charleston, South Carolina, not later than Monday, May 8, 1995, for *in camera* inspection by the court. . . .

[Order, 4/20/95, pp. 2-3].

Following an extensive inspection of the documents submitted to the court, the court issued its order on July 25, 1995; and, following later submissions by the government, discovery orders were filed September 7 and October 6, 1995.

On October 18 through 20, 1995, the court held another hearing in Columbia. At this hearing, additional government files came to light and the defendants argued with specificity for reconsideration of portions of the court's order of July 25, 1995. They further requested FBI computer-generated printouts of the inventories of the FBI's entire "Lost Trust" and "Capital Gains"[10] investigatory files, which resulted in Taylor filing an additional motion on January 19, 1996. Following a second lengthy *in camera* inspection by the court, and in response to Taylor's January 1996 motion, the court issued an order on February 6, 1996. At that time, the court ordered that the hearing held in recess since the previous October be reconvened on March 11, 1996, at which time all parties were to "be prepared to present and complete testimony and arguments with regard to the motions to dismiss now pending before this court." The government subsequently moved on February 14, 1996, for reconsideration of the February 6th order, to which the defendant Taylor filed an objection, and the court ruled on this motion by order of February 23, 1996.

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[10]The Capital Gains Tax issue is fully addressed hereinafter in this order.

The health of defendant Gordon continued to be an issue, and his counsel sought a continuance of the March 11, 1996, hearing date. The continuance was granted; however, on May 24, 1996, the court, following a telephone conference with all parties, conditionally severed the defendant Gordon[11] and reset oral arguments on the dismissal motions for May 29, 1996. On the day prior to that scheduled hearing, May 28th, the undersigned judicial officer suffered a heart attack and underwent angioplastic surgery on that date, and again on June 28th and August 19th. Thus, the hearing was not reconvened until October 3, 1996. Following a full day's hearing on October 3rd, the parties were given the opportunity to submit in writing any additional argument on matters in evidence on or before October 18th. The court received a letter under date of October 8, 1996, from the attorney for Taylor, and the government filed a memorandum on October 18, 1996, to which were attached Affidavits from former U. S. Attorney E. Bart Daniel, former Assistant U. S. Attorney Dale L. DuTremble, and Assistant U.S. Attorney John M. Barton, the chief prosecutors in these cases.[12] By letter under date of October 24, 1996, to the court, Derrick's attorney lodged a protest to the filing of the three Affidavits as an attempt by the government to add to the record after the close of the hearing, and the court ruled that the Affidavits would not be considered.

The joint motions of the above defendants to dismiss the superseding indictment as to Taylor, Blanding and Gordon

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[11]Under the terms of this conditional severance, defendant Gordon was rejoined in this matter by order of January 21, 1997.

[12]Hereinafter, the designation USA is used to denote United States Attorney; the designation AUSA is used to denote Assistant United States Attorney, and the designation USAO is used to denote United States Attorney's Office.

and the indictments as to Derrick and Long on the grounds of double jeopardy and prosecutorial, agency and/or investigative misconduct are now ready for a ruling by this court.

II. DEFENDANTS' MOTIONS TO DISMISS

Some three to four weeks prior to the commencement of his trial, Taylor filed his first motion to dismiss on the grounds of investigative agency and prosecutorial misconduct in which he charged (1) that the government's presentation to the Grand Jury was legally insufficient and exculpatory evidence was withheld, (2) that the conduct of the U. S. Attorney with regard to pretrial publicity had been improper, and (3) that the government engaged in fundamentally unfair investigative practices. Following a hearing and additional memorandums, this court denied his motion. [Order, 10/9/90].

Likewise, a joint motion was filed prior to trial by defendants Fant, Blanding and Gordon to dismiss for prosecutorial misconduct or, in the alterative, for sanctions, on the grounds (1) that the government violated an order of the court concerning pre-trial publicity, and (2) that the government violated the Code of Federal Regulations governing the release of information in criminal actions by personnel of the Department of Justice. The motion was denied at a hearing on November 19, 1990.[13] On the day jury selection commenced in the Blanding/Gordon case,[14] February 25, 1991, the defendant Gordon filed a motion to dismiss for prosecutorial misconduct on the ground that *Brady* material furnished by the

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[13]This motion was denied by The Honorable Charles E. Simons, Jr., U.S.D.J., who was originally assigned to hear this case. The case was subsequently reassigned to the undersigned.

[14]Co-defendant Fant had pled three days before.

government only three days earlier[15] would show that the government's key witness had perjured himself both at the Taylor trial and before the Grand Jury and that the government had taken no steps to correct the matter. The motion was denied by this court at a hearing on March 1, 1991.

The cases proceeded to trial, conviction, and remand on appeal. Prior to retrial, however, on September 29, 1993, Taylor filed a motion to dismiss on the grounds (1) that the government had withheld evidence both exculpatory in nature and favorable to Taylor in violation of the letter and spirit of the *Brady* case, and (2) that during the original trial proceedings the government generated extensive, prejudicial pre-trial publicity, thus denying defendant a fair trial in violation of the double jeopardy clause of the Fifth Amendment to the United States Constitution. At a hearing on October 12, 1993, the court took the motion under advisement. On February 12, 1994, Taylor filed a supplemental memorandum which informed the court that he had received from the government under date of November 29, 1993, a substantial number of documents and tapes never seen before. In the memorandum, Taylor identifies recently received materials which he claims overwhelmingly establish the extent and scope of the government's violations of its responsibilities under *Brady* at the time of his first trial. He cites to specific pre-trial discovery sought via five *Brady* motions. Additionally, he claims that the theories of his defense were disclosed prior to trial so that the government cannot claim that it failed to see the exculpatory nature of the evidence sought but not disclosed; that defendant made an ample, if not overwhelming, record of his Brady requests; that rather than disclose the evidence it had

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[15]This disclosure followed a hearing on defendant Gordon's *Brady* motions of November 5, 1990, and January 7, 1991, wherein the court directed the government to furnish the specified material.

which could be used to impeach its witnesses, the government sought to preclude the issue, and that during the trial defendant made further requests for *Brady* material to which the government attorneys made deceitful responses, thereby breaching their duty as officers of the court.

On February 22, 1994, defendant Gordon filed his motion to dismiss the superseding indictment on the grounds (1) that the government intentionally withheld certain *Brady* material during his first trial, (2) that the government lied to the court about the existence of the *Brady* material, and (3) that the government allowed perjured testimony to be presented to the court.

Derrick filed his motion claiming prosecutorial misconduct in the withholding of *Brady* materials on April 19, 1995, and supplemented this motion on September 5, 1995.

Taylor filed a Second Supplemental Memorandum to his motion to dismiss on August 25, 1995, in which he expands his argument that the government was guilty of outrageous misconduct in that, among other things, it failed to supervise adequately a paid government informer, disregarded FBI regulations by questioning a target without *Miranda* warnings, delayed in transcribing interviews of witnesses, allowed false declarations before the Grand Jury and false testimony at trial which it did not correct, communicated with the defendant after trial without prior notice to his counsel, participated in prejudicial pretrial publicity, engaged in a pattern of conduct calculated to infringe on the Grand Jury's ability to exercise independent judgment; misrepresented facts proven false by documents later found in the government's file, failed to present exculpatory evidence to the Grand Jury, withheld prior exculpatory testimony and misrepresented to the court and the defense that the prior testimony existed; tainted the proceedings by misrepresentations and indiscretions of government agents, failed to provide proper warning to a Grand Jury target prior to

his testifying before the Grand Jury, and perjury by a government agent.

A Third Supplemental Memorandum was filed by Taylor on March 28, 1996, following access to discovery materials furnished by direction of this court's order of February 6, 1996, as amended by order filed February 23, 1996. Taylor argues here that the new materials prove (1) that throughout this sting operation the government violated its own representations, the instructions it was required to follow, and the rules designed to insure fairness; (2) the perjury of Ron Cobb and Agent Clemens, as well as the false statements and arguments of the government attorneys, and (3) willful *Brady* violations. He further contends that this material contains new *Brady* material of which defendants had no prior knowledge.

The defendants previously have taken issue with the handling of the investigation by the Department of Justice Office of Professional Responsibility (DOJ/OPR) and the Federal Bureau of Investigation Office of Professional Responsibility (FBI/OPR) after the OPR reports were furnished to the defendants in January of 1995. Taylor's letter submission of October 8, 1996, includes a summary of his allegations that the pattern of misconduct extends beyond the local FBI and U.S. Attorney's offices to a pattern of dissembling by FBI Headquarters and the Department of Justice as well.

III. GOVERNMENT'S RESPONSES TO MOTIONS TO DISMISS

The government responded on October 6, 1993, to Taylor's motion to dismiss of September 29, 1993. These documents were filed following remand but prior to recusal by the U.S. Attorney for the District of South Carolina and prior to the government furnishing additional discovery materials to the defendant on November 29, 1993. The government's response was prepared by AUSA Barton, who states therein:

> The United states not only vehemently denies these allegations but also maintains that even if true, neither these allegations nor the Fifth Amendment provide any basis for dismissal of the Superseding Indictment in this case.

[Gov's. Response to Def. Taylor's Motion to Dismiss Indictment, 10/6/93, p. 1].

In its argument against the allegation of the suppression of exculpatory evidence being material to the outcome of the trial, the government states that the defendant Taylor failed to show that there was a reasonable probability that the result of the trial would have been different had the evidence been disclosed; and, further, that defendant did not make full use of the information available to him, and thus no *Brady* violation occurred. The government also argues that Taylor has "abjectly failed to support his 'extensive, prejudicial publicity' assertion." As to defendant's Fifth Amendment double jeopardy claim, the government relies on the finding in *United States v. Borokinni*, 748 F.2d 236 (4th Cir.1984), and concludes that, even if Taylor's alleged *Brady* violations were accurately stated and that the information was willfully withheld by the government, the Fifth Amendment's double jeopardy would not provide a basis for the dismissal of the indictment.

Following the receipt by defendant of additional discovery on November 29, 1993, as mentioned above, Taylor filed a supplemental memorandum on February 10, 1994, and Gordon filed his motion to dismiss on February 22, 1994; the matter was referred to the DOJ/OPR for investigation and attorneys from the Public Integrity Section, Criminal Division, of the DOJ were substituted for the U. S. Attorney's Office in South Carolina. In opposition to both Taylor's and Gordon's motions and memorandums, an extensive memorandum was filed on the government's behalf on October 31, 1994, by

Daniel J. Butler, Senior Trial Attorney, and other DOJ attorneys.

The Butler memorandum reiterates the government's previous argument that there has been no showing of intentional government misconduct or longstanding pattern of misconduct. The government argues that the defendants' contentions primarily relate to the non-production of two FBI FD-302s,[16] and cites to the Fourth Circuit's ruling in *USA v. Taylor*, 966 F.2d at 837, where the court, in response to the defendant's claim that the government did not produce all evidence bearing on witness Cobb's credibility, held that "... [Taylor] is now aware of this evidence and may use it as the Rules of Evidence may provide at his retrial." The government claims that other *Brady* violation claims by the defendants, such as Cobb's use of cocaine, witness Robert Kohn's[17] use and

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[16]An FBI FD-302 (sometimes referred to herein simply as a 302) is a government form used by the FBI. Its Manual of Administrative Operations and Procedures, Part II, Section 10-12(3), requires that "[o]riginal notes of interview with prospective witnesses and/or suspects and subjects must be retained in the 1A section of the case file. That is, in any interview where preparation of an FD-302 is required (an interview where it is anticipated the results will become the subject of court testimony) the rough handwritten notes are to be retained."

The defendants argue that these FD-302s allowed the primary government witness Cobb to testify falsely. They also dispute the government's conclusion that these two FD-302s form the only basis for their *Brady* violation allegations.

[17]Robert Alfred Kohn, who was indicted with Taylor and who pled guilty as previously cited. Kohn also became a government informant later in the investigation.

sale of cocaine, other video- and audio-tapes of Kohn and other taped interviews of co-conspirators, can also be remedied by a new trial. In response to other defense allegations, the government denies that there was any intentional misleading of the court or the defendant and no knowing presentation of perjured testimony. The government also makes its argument as to the requirement that the defendants must show prejudice, which it claims they have not done, and presents an argument against defendants' exclusive reliance on the case of *United States v. Shafer*, 987 F.2d 1054 (4th Cir.1993), for dismissal of the superseding indictment on double jeopardy grounds and against defendants' argument for dismissal based on the court's supervisory powers.

Subsequent to the above filings and as a result of a hearing on October 20, 1994, the "evidence room" was established as of December 1, 1994, in which the government was directed to make all discovery available to the defendants. Numerous discovery disputes arose; the court conducted *in camera* inspections of documents which the government sought to have excluded, and another discovery hearing was held on April 19, 1995.

Defendant Derrick then filed on that date his separate motion to dismiss. On August 25, 1995, Taylor filed his Second Supplemental Memorandum in which he detailed various other allegations of government misconduct he claims came to light only as a result of the additional discovery at his disposal. Derrick also filed a supplement to his motion on September 5, 1995.

On September 25, 1995, the government responded to Taylor's August (Second Supplemental) memorandum. It summarizes Taylor's arguments for dismissal as (1) nondisclosure of *Brady* material, (2) misstatements to the court regarding the existence of discovery material, and (3) the knowing presentation of false testimony. It incorporates its

earlier response that "under either an 'outrageous' conduct theory or the Court's supervisory power, a motion to dismiss requires the defendant to prove *both* intentional governmental misconduct *and* demonstrable prejudice." [Footnote omitted]. Again, the government summarizes the defendants' contentions into three subject areas: (1) Taylor's response to the government's memorandum in opposition to the motions to dismiss; (2) the discovery produced since December 1, 1994, and (3) the capital gains tax matter. The government argues specifically with regard to defendant Taylor that, although he now has many more items of discovery which he did not have at his first trial, this is due in large part to the fact that he now has all of the Lost Trust discovery, whether it relates specifically to him or not. The government again argues that "the remedy for a significant *Brady* violation is a new trial, not dismissal of an indictment." As to Taylor's allegations of misstatements by the government to the court or the knowing use of false testimony, the government contends that defendant has completely failed to show bad faith on the part of the government and has not even "begun to refute the conclusions of the Offices of Professional Responsibility . . . for the Department of Justice . . . and the FBI which failed to find merit in [his] allegations." The government also puts forth the argument here that defendant Taylor lacks standing to challenge the alleged misconduct in trials of other Lost Trust defendants and there is no long-standing pattern of government misconduct. In this memorandum the government also refutes Taylor's allegations as to various items of evidence he claims were withheld. These items will be dealt with with specificity later in this order.

In its response to defendant Derrick's motion, the government also contends that this defendant has failed to show any intentional misconduct or a longstanding pattern of misconduct or any prejudice which would warrant dismissal of the indictment against him, and that any remedy to which he is entitled has been granted in his impending retrial.

After Taylor filed his Second Supplemental Memorandum in August 1995, this court, in October 1995, held a three-day hearing, which resulted in a second extensive *in camera* inspection and orders filed February 6 and February 23, 1996. The oral arguments by defendants in October 1995 were sufficient to convince the court that the volumes of material that continued to surface and their possible significance to the defendants warranted the issuance of an order directing the government to grant access to the defendants to many documents previously denied to the defendants by the court. Upon review of these documents, Taylor filed his Third Supplemental Memorandum on March 28, 1996, to which the government responded on April 16, 1996.

In its opposition, the government refers to its previous opposition briefs to show that Taylor has failed to carry his burden of proving any intentional government misconduct, let alone a longstanding pattern of misconduct. . . . Nor has the defendant demonstrated any prejudice to his rights that would affect the outcome of his retrial before this Court. Defendant's Memorandum merely cobbles together a voluminous stew of quotations from the government's administrative files together with unwarranted speculation and erroneous legal conclusions, all to support his theory that this Court should take the drastic and disfavored step of dismissing an indictment.

[United States' Opposition to Def. Taylor's Third Supp. Memo, 4/16/96, p. 1].

The government further responded to Taylor's argument—that the new materials prove that throughout this sting operation the government violated its own representations, the instructions it was required to follow, and the rules designed to insure fairness —by affirmatively stating that the government did not violate its internal policies and by citing to a disclaimer in the privately-published "DOJ Manual" to which the defendant's memorandum referred. It defends its

use of the pari-mutuel betting bill for its "sting" operation and its payments to its primary witness, Ronald L. Cobb.

As to defendant's charge of perjury by Cobb and SA Clemens, as well as false statements and arguments by government attorneys, the government argues that no document in the government's files, no document quoted by the defendants, and none of the recently disclosed materials prove that Cobb testified falsely, but only that the government agents and prosecutors did not agree with certain of his interpretations.

In addition, as to the third general charge by defendants of willful *Brady* violations, the government again denies that any documents were willfully withheld or that the defendants are in any way prejudiced since the remedy of retrial is available.[18]

In its Post-Hearing Memorandum in Opposition to Defendants' Motions to Dismiss, filed October 18, 1996, the government, in addition to its legal arguments as to the defendants' burden of proof, sets out the general denial that there was no intentional effort by the government to withhold discovery; that the discovery errors were, at most, inadvertent and immaterial, and that the government did not intentionally mislead the court about discoverable materials. This memorandum also addresses the defendants' claims of government-sanctioned perjury by Cobb and misconduct in the investigation of the capital gains tax matter. It also touches on several other defense allegations as will be more fully shown hereafter.

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[18]The government's memorandum expands on several of these arguments, but, as mentioned earlier in this order, the specifics of the allegations will be addressed later in this order.

IV. THE OPEN FILE POLICY

From the outset, these cases were to be tried under what is referred to in this district as an "open file policy." During its tenure on the bench, this court has conducted numerous criminal trials under this policy and never before has its interpretation been so challenged as in the government's present arguments. As a lawyer and a judge, this court's experience has been that "open file" meant that the government's entire discovery file would be made available to the defendants for their examination. There are, of course, certain documents excluded from this policy under the government's internal administrative and work product privilege. It has long been established that when an "open file" policy is declared, the dictates of *Brady* and *Giglio* as well as Bills of Particular, become extraneous; *all* discovery material, except as limited to privileged work product, is made available to the defendants. This would have come as no surprise to USA Daniel or his assistants, most of whom had prosecuted cases before this court on numerous occasions.

As shown above, motions to dismiss for prosecutorial misconduct had been filed by one or another of these defendants during the preparation and pendency of their original trials in 1990 and 1991.[19] One of the primary grounds on which those motions and the more recent motions are based is the willful withholding of *Brady* and other exculpatory material. The defendants have persisted in their allegations that the government had to be withholding evidence critical to their defense and specifically requested some of this evidence in their discovery motions. Where it felt appropriate, the court instructed the government to turn over requested materials, if

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[19]The motions filed in connection with the initial trials have been incorporated by the defendants with the motions to dismiss filed post-remand in these matters.

they existed, to the defendant. But the government would respond by either declaring that disclosure or unredacting of the requested documents would jeopardize ongoing investigations or by affirmatively asserting, without any qualification, that it had complied with its discovery obligations. The existence of several specific documents sought by the defendants was denied in open court by the prosecutors and by SA Clemens under oath.

V. DISCUSSION OF THE ISSUES

The instant cases first came before the court over six years ago with the indictment of Taylor in August 1990. The evidence as it relates to the retrials of these defendants is in and of itself voluminous. Together with the additional materials that relate to the charges of prosecutorial misconduct, the record now before the court is so vast as to make it virtually impossible to cite to all of the allegations and counter-arguments in detail.

The strongest arguments the defendants make as to the significance of the withholding of *Brady* materials and other exculpatory evidence are found in the arguments relating to several of the issues to be addressed by the court at this time. In addition, defendants' allegations of perjury by certain witnesses and the government's knowledge thereof, as well as alleged misrepresentations to the defendants, the Grand Jury and the court, rising to the level of fraud upon the court, as revealed by the post-remand disclosure of evidence, must also be addressed.

1. The Withholding of Evidence as to Cobb's Characterization of the Payments Made to Legislators.

Cobb consistently testified that he considered the monies he gave four of these defendants to be bribes.[20] These defendants have consistently argued that the monies they received were considered by them to be campaign contributions and contend that certain withheld 302s would have served to impeach Cobb's "bribery" testimony. On June 14, 1989, an FD-302 of a Cobb debriefing was prepared by SA Clemens. This 302, which was not turned over to the defendants until November 29, 1993, states on page 2:

> COBB related that in regards to giving money to State Legislators, he routinely gives two or three hundred dollars to some just to keep them friendly toward him. . . . COBB stated that TEE FERGUSON, CHARLES A. HARVIN, III and DONNA MOSS were among those who he would give money. . COBB indicated this money was not paid for any specific return benefit other than having someone friendly to him on whom he could call.

[Taylor's Supp. Memo, 2/10/94, Exh. 4, p. 2].

Again, on June 22, 1989, Clemens prepared another Cobb FD-302, which did not surface until the Derrick trial. This 302 states in pertinent part:

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[20]Cobb testified at the Long trial that he knew Long was not accepting a bribe under the circumstances in which the money was exchanged.

> RONALD L. COBB provided a 1989 South Carolina Legislative Manual in which he had checked off all those legislators to whom he had paid money. When asked if these were bribe type payments or campaign contributions COBB replied, "That's a hard question to answer." *COBB was then asked if those checked off were persons he had given two, three, or four hundred dollars to for no specific reason other than to maintain favorable contact with COBB. COBB indicated that this was the case, and indicated he would give the money to the legislator and that was it.* If the individual then wanted to claim it as a campaign contribution and report it or just stick it in his pocket, that was of no concern to COBB. [Emphasis added].

[Taylor's Supp. Memo 2/10/94, Exh. 1].

The names of each of the within defendants are shown as "checked off" in the Legislative Manual; however, the listing of names with check marks next to them includes the names of numerous other legislators who were never targeted or indicted by the government in the Lost Trust investigation.[21]

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[21]A complete listing of the legislators checked off by Cobb includes State Senators James E. Bryan, Herbert U. Fielding, Donald H. Holland, John C. Land, Hugh K. Leatherman, W. Richard Lee, John C. Lindsay, Jefferson Marion Long, Isadore E. Lourie, J. Yancey McGill, Peden B. McLeod, Theo W. Mitchell, Thomas L. Moore, Michael F. Mullinax, Kay Patterson, Harvey S. Peeler, Jr., Edward E. Saleeby, Nikki G. Setzler, Horace C. Smith, J. Verne Smith, David L. Thomas, James M. Waddell, Marshall B. Williams, Addison Graves "Joe" Wilson, and State Representatives

On July 26, 1989, another Cobb FD-302 was prepared by Clemens and was only turned over to the defendants after the issuance of this court's November 8, 1994, order. The following information is contained therein:

> COBB was asked about the manner in which he would pay legislators several hundred dollars. COBB stated that this was sometimes accomplished with cash, and sometimes by check, either from his business or personal account. COBB advised that sometimes payments were made at official fund raisers and sometimes in a social setting as a token of appreciation for support on something.
>
> COBB stated that sometimes a legislator will drop a hint that money is tight and that they could use some cash. COBB added that if it was someone who was friendly toward his

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Milton O. Alexander, George H. Bailey, Boyd Odell "Dell" Baker, Liston D. Barfield, J. Michael Baxley, David M. Beasley, Larry Blanding, William D. Boan, Grady A. Brown, Robert B. Brown, Danny M. Bruce, Milford D. Burriss, Marion P. Carnell, Cebron Daniel Chamblee, H. Howard Clyborne, M. J. Cooper, G. Ralph Davenport, Paul W. Derrick, Dick Elliott, John G. Felder, Tee Ferguson, B. J. Gordon, Jackson V. Gregory, Patrick B. Harris, C. Alexander Harvin, III, B. Hicks Harwell, D. N. Holt, Jr., Thomas E. Huff, Robert A. Kohn, Larry L. Koon, Thomas A. Limehouse, James G. "Jim" Mattos, Jennings G. McAbee, Frank E. McBride, Eugene Belton McLeod, Jr., Donna A. Moss, Thomas N. Rhoad, John I. Rogers, III, Robert J. Sheeheen [sic], Paul E. Short, Jr., Luther L. Taylor, Jr., John W. Tucker, Jr., Dave C. Waldrop, Jr., McKinley Washington, Jr., Juanita M. White, David H. Wilkins and Daniel E. Winstead.

> interests he would take care of them with a few hundred dollars. COBB emphasized that he did not know and did not care how they handled or reported the money. COBB's sole interest was to gain friends and supporters of his interests.

[Hearing, 10/18-20/95, Taylor Exh. 3].

This language from these three FD-302s is used by the FBI-Columbia Office almost verbatim in its Undercover Operation Proposal (UCO) dated September 5, 1989 [Taylor's Third Supp. Memo, 3/28/96, Exh. 1, p. 13], seeking authorization for this undercover operation. The government, therefore, was totally familiar with the existence of these 302s, yet it did not turn them over to the defendants for use at trial.

Reference in the above-quoted FD-302 of July 26, 1989, to payments being made to legislators "sometimes by check, either from his business or personal account," prompted requests from the defendants for Cobb's financial records. At the final hearing on the instant motions on October 3, 1996, testimony was elicited on direct examination of Mrs. Rhonda Collins[22] that the defendants were furnished with the records of Cobb's business account—Government Business Associates, Inc.—in or about May 1995. She stated that copies of nine (9) checks payable to various legislators in amounts between $100

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[22]Mrs. Collins is the wife of Taylor's attorney, Joel W. Collins, Jr. She is a graduate of Winthrop University and a former Trust Officer with South Carolina National Bank, now Wachovia. From time to time in the past she has been employed at Collins and Lacy, P.C., her husband's law firm. She has worked without compensation on Taylor's case continuously since its inception, primarily handling the organization of documents. The government did not oppose her qualifications to testify in this regard.

and $650[23] have been found in these records. Mrs. Collins further stated that the defendants had never been furnished copies of Cobb's personal financial records. The defendants argue that the nine checks in increments of $100 to $650 corroborate the information quoted above from the FD-302s of June 14, 1989, June 22, 1989, and July 26, 1989, and that this information would have served to refute Cobb's testimony at the trials that the payments he made to these defendants were definitely known by them to be bribes. [*See* Hearing Tr., 10/18-20/95, pp. 56-66].

In its Post-Remand Memorandum, the government argues that the financial records of Government Business Associates were submitted to the court for *in camera* inspection and that the court's order of July 25, 1995, held that the government need not provide these records to the defendants, but that upon resubmission the court ordered that the records be provided to the defendants on September 7, 1995. It is the government's contention that this reflects the "less than clear nature of the discoverability of certain documents in this matter, especially these checks." A reading of this court's September 7th order, however, simply shows an admission by the court that it did not properly identify the photostatic copies of bank statements and canceled checks on this account in the first *in camera* submission of eleven file boxes of material under review. More importantly, however, the question is not why these records were not furnished in 1994 or 1995, but why they were not furnished to the defendants prior to their initial trials in 1990 and 1991.

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[23]Also found in these records were copies of seven (7) checks payable to State Senator John Charles Lindsay of Marlboro County, South Carolina, including two (2) $10,000 checks and one (1) check for over $20,000. [Hearing 10/18-20/95, Taylor's Exh.12].

In addition to the above, defendants cite to the withholding of 302s on James Faber, Frank Earl McBride, and Ennis Maurice Fant, all dated July 18, 1990, in which each of them stated they believed the monies they received from Cobb to be campaign contributions. [Taylor's Motion to Dismiss, 9/23/93, Exhs. 13-15]. These 302s were derived from interviews conducted by the FBI simultaneously with the FBI's initial interview of defendant Taylor.[24] All four of these defendants (Taylor, Faber, McBride and Fant), as well as others, were approached in a "sweep" by the FBI of targets of the Lost Trust investigation and must have been considered all part of the same case. Even had the defendants not been able to utilize these 302s at trial as statements of unavailable witnesses, as argued by the government in its Post-Hearing Memorandum, it is the opinion of the court that these 302s should have been provided as relevant discovery material.

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[24]Taylor was first approached about 9:00 a.m. on July 17, 1990, in the driveway of his home by three FBI agents. They requested that he accompany them to their offices. He was interviewed for approximately seven hours, during which time he admitted receipt of monies from Cobb that he considered to be campaign contributions. Late in the afternoon, Taylor acquiesced to appearing before the Grand Jury. He was not told he was a target of the investigation, was not given a *Miranda* warning before testifying, and was not asked in the Grand Jury how he categorized the monies he received from Cobb. Following his testimony, he was taken to a local motel where agents stayed with him overnight in shifts. Clemens testified at Taylor's trial that Taylor was kept in FBI custody because they were concerned that he was depressed to the point of being suicidal. However, they also bought him a liter of Scotch whiskey, and it is curious they chose a known depressant, alcohol, to assist him through this "suicidal" state.

Cobb testified that after he had been set up by the FBI as a lobbyist for the bogus Alpha Group in order to catch legislators accepting bribes for their support of the pari-mutuel bill, he sought the help of defendant Taylor in recruiting black legislators and the help of Kohn in recruiting white legislators. Taylor argues in his memorandum of February 10, 1994, that taped conversations between Cobb and Kohn

> go to the vital issue of whether or not the government was running a sting to catch crooked legislators or whether, on the other hand, Cobb was trying to make it appear that he could buy votes from legislators other than Senator Lindsay in an effort to save himself from the consequences of numerous illegal acts for which he could be prosecuted.

[Taylor's Supp. Memo, 2/10/94, p. 9].

Taylor was a co-sponsor of the pending pari-mutuel bill and sat on both the Labor, Commerce & Industry Committee of the House of Representatives and the Banking and Consumer Affairs Sub-Committee. Prior to the institution of the sting operation, the pari-mutuel bill had successfully passed these committees. Taylor contends that his continued support of the bill was not an explicit *quid pro quo*. He argues that this is corroborated on a tape recorded conversation of January 16, 1990 (Tape #14), on which Kohn is heard to remark: ". . . we got the thing out of committee with no one doing anything.... No money, and you know, just, just doin' for the issue." [Taylor's Supp. Memo, 2/10/94, Exh. 9, p. 2]. Taylor further argues that this same tape shows that, in spite of FBI instructions to Cobb to be explicit about the *quid pro quo* aspect of his payments to legislators, Cobb felt the need to be far more subtle in his approach. In encouraging Kohn to bring supporters to him, Cobb instructed Kohn:

> You know how to, I mean you know how to work it and cover us, I mean, we don't want come over there and say well, here, they're gonna buy the damn thing.

[*Id.* at p. 4].

On an audio tape of April 5, 1990 (Tape #75), Kohn tells Cobb:

> (UI) I'm not trying to hold back, I mean I realize (UI) I ain't trying to play that game. (UI)I've been asked for gold coins. If it doesn't look like money should be brought up, I don't do it to hold back money, I just don't think it's good to bring it up (UI). I use (UI) some of them I just casual comment about a contribution to their campaign 'cause see if you have to do that I can write a check and tell them I think their [sic] a good spirited citizen (UI).

[*Id.*, Exh. 12, p. 13]. The transcript of this tape is made a part of an FD-302, which states that this audiotape is of a telephone conversation Cobb has with a Wade "Ronnie" Crow,[25] followed by a meeting with Faber, McBride, Kohn, Taylor and one Rachel Harper. Taylor is shown to speak only once, and it is impossible for the court to ascertain whether he was present at the time the above statement was made by Kohn. His name, however, does appear in the cover FD-302, yet he was not furnished this tape or the FD-302 and transcription prior to his trial.

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[25]Wade Ronald Crow, who was indicted with House Speaker John I. Rogers, III, and pled to one count of aiding and abetting extortion under the Hobbs Act.

These tapes, as well as the numerous other audio and video tapes furnished to the defendants on November 29, 1993, certainly must be viewed as exculpatory evidence which could have been used to further the defense put forth by these defendants that they considered the monies they received from Cobb to be campaign contributions.

In this order the court cites allegations primarily from the arguments, memorandums and exhibits of defendants Taylor, Blanding and Gordon. In fact, with regard to the timing of their trials and evidence not furnished to them for their defenses, their positions are closely related. Derrick was the defendant in the third Lost Trust trial, and some, although by no means all, of the previously withheld evidence was available to him and defendant Long for their trials.[26]

Defendant Derrick also presented additional testimony at his trial that the monies he received from Cobb were used to produce a semi-annual newsletter to his constituents. The government objected to the admission into evidence of a copy of the newsletter he had published in the spring prior to his indictment on the grounds that it had never received a copy of that newsletter, that it was hearsay, and that it was irrelevant. Paul Derrick affirmatively stated at trial that he had given a copy to the government. At a hearing on April 19, 1995, Derrick disclosed that "we have just recently discovered in the most recent documents an FBI 302. Guess what is attached to it? That news letter. They had it. . . . We didn't get to get that in during the trial." [Hearing Tr., 4/19/95, p. 37].

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[26]Derrick has also pursued a defense of entrapment and cites in his memorandums and arguments to specific evidence that was withheld which he believes would have supported this defense. In light of the findings herein, the court need not address the entrapment issue.

Defendant Long is presently before this court for a new trial granted him by this court, which decision was upheld on appeal. At the conclusion of the Long trial, this court dismissed one count against Long; however, tapes ruled pertinent only to the dismissed count inadvertently had been allowed to go to the jury room. Long, however, has joined in the motions for dismissal on the grounds of prosecutorial misconduct as the motions may relate to him.[27]

At the motions' hearing in October 1995, Long cross-examined Cobb concerning his testimony at Long's trial that when Cobb gave Long the money in question in this case, Long had no idea that it was a bribe. The transcript from October 19, 1995, reads:

> Q. That he would have thought that you were simply helping him out of his financial difficulties, and it was not related to any legislation pending. in the South Carolina Legislature; is that correct?
>
> A. That's correct, yes, sir.
>
> Q. Specifically the pari-mutuel bill?
>
> A. Yes, sir.
>
> Q. And the pari-mutuel bill, as a matter of fact, was something that Bud Long had always supported; is that correct?
>
> A. Yes, sir.

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[27]Any grounds for dismissal of the indictment of Long, outside of those for prosecutorial misconduct, need not be addressed at this time.

Q. As I understand it, it is your position that Bud Long never had the intent to accept a bribe?

A. That's correct.

Q. And that you led him to believe, or did not lead him to believe other than it was just some money from a friend to help him out of his financial difficulties?

A. He was in a tight, [sic] and he had been very valuable in assisting me in getting clients, and I had given Bud money from time to time, and he could very easily have thought that this was one of those situations. As a matter of fact, I think he even told me to make sure—I think he may have looked at it as a contribution, because he told me one time to make sure that I thank my people for the contribution.

. . . .

Q. Now, let me ask you this, which I was not able to ask at the trial, because I did not know about that until the trial, prior to the meeting ever being arranged or your discussion with Bud Long concerning this money, did you communicate to the F.B.I. that it was unfair to put Bud Long in that position, because of, number one, his financial difficulties; and, number two, because of your unique relationship with him, he would not understand and not realize it was a bribe?

A. Yes, sir, I did; also, to the U. S. Attorney's Office.

Q. This is prior to it ever coming about?

A. That's correct.

[Hearing Tr., 10/19/95, Vol. II, pp. 32-3].

Cobb further testified that in the time frame prior to the exchange of money with Long, he voiced the same concern to AUSA Alfred W. (Buddy) Bethea, SA Clemens, USA Daniel, and AUSA Barton; but, in spite of his protestations on more than one occasion, SA Clemens instructed him to go ahead and meet with Long. [*Id.* at p. 34]. He further testified that he repeatedly told AUSA Bethea, who was to be the lead prosecutor for the Long trial, that Long would have had no reason to believe that the money he was accepting from Cobb was bribe money. When asked for AUSA Bethea's reaction, he stated:

> His reaction was one of he had made up his mind that Bud Long was guilty, he wanted to try him, he hadn't participated in any of the trials, and he was more gung ho, I think, about trying the case than anything else. We had a very strong disagreement in this regard.

[*Id.* at pp. 40-1].

When Cobb testified to the above on direct examination by AUSA John W. McIntosh at Long's trial, McIntosh personally refused to proceed with the prosecution; and USA Daniel, who had not been part of the trial prosecution team, replaced him for the balance of the trial.

2. *The Capital Gains Tax Investigation and Ronald L. Cobb.*

Cobb has been previously identified in this order as the government's key confidential informant employed in the sting operation. Cobb was a former member of the South Carolina State Legislature and a licensed lobbyist. He maintained throughout these cases that he was a close personal friend of Lindsay, who was undisputedly one of the most powerful men in State government. Lindsay was a member of the Senate Conference Committee appointed to negotiate the differences between the Senate and House versions of the 1988 Appropriations Bill, in which a capital gains tax "rollback" provision had been included as a "proviso."

Prior to his trial, Taylor had received a substantially redacted FD-302 of an interview of lobbyist J. Randal Lee by SA Clemens and SA Thomas J. Davis conducted August 14-21, 1990. [Hearing, 10/18-20/95, Gordon Exh. G]. Taylor argued that he was entitled to place Cobb's credibility before the jury and that to do so he would need to review documents he believed to be in the government's possession, and to be furnished the identity, which had been redacted from the documents furnished, of various elected officials to whom Cobb had made payoffs. A transcript of a pre-trial motions hearing on October 11, 1990, reveals Taylor's argument that "nothing is more relevant to this whole case than the credibility of Mr. Ron Cobb." [Hearing Tr., 10/11/90, pp. 37-42]. Apparently, the Fourth Circuit Court of Appeals agrees.[28]

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[28]In its opinion dated May 29, 1992, in the *Taylor* case, the Fourth Circuit Court of Appeals stated: "The government argues that Cobb's testimony was not critical to its case and that his credibility was not a significant issue at trial, but a review of the transcript reveals that these arguments are ludicrous. Cobb was the cornerstone of the prosecution's case and his

Some six days prior to the Blanding/Gordon trial, the government turned over to those defendants the unredacted FD-302 dated August 14-21, 1990 [Taylor's Supp. Memo, 2/10/94, Exh. 7], which disclosed that Lindsay's name had been redacted in the version furnished Taylor. This 302 discusses at length the South Carolina Capital Gains Tax bill initiated in 1988 (the "proviso"), and puts the government on notice of alleged bribe payment arrangements involving Richard E. Greer, Chairman of the South Carolina State Development Board, Lindsay, Cobb, and various other persons.

Also during the Blanding/Gordon trial, on February 22, 1991, as the result of a court order of February 14, 1991, the government furnished the Blanding/Gordon defendants with an unredacted FD-302 of an interview of Cobb by FBI SA Arthur Richards dated May 1, 1989, which revealed Lindsay's involvement in payoffs regarding legislation known as the Oil Jobbers bill. At a hearing on Blanding and Gordon's motions to dismiss for prosecutorial misconduct filed on February 25, 1991, and heard February 28, 1991, Richards confirmed under oath Cobb's understanding that the debriefing on May 1, 1989, concerned "payoffs and kickbacks and extortion. We were talking about payoffs." [Gordon's Motion to Dismiss, 2/22/93, Exh. C, p. 120]. Richards testified that he debriefed Cobb prior to and after he administered a polygraph examination. On direct examination by Gordon, Richards related that Cobb initially failed the polygraph test he was administering to him concerning the Oil Jobbers bill, testifying as follows:

> A. . . . . He [Cobb] said that through an intermediary, that he initially would not

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credibility was the paramount issue at trial." *USA v. Taylor*, 966 F.2d 830, 837 (4th Cir. 1992).

identify, he paid Representative Mangum [sic][29] $10,000 in order to get his vote. That was the first issue that I polygraphed.

Q. Okay. Now the issue that you polygraphed him on was whether or not he in fact paid representative Mangum the $10,000 through the intermediary.

A. That's correct.

Q. All right, sir. And he tested truthful on that?

A. He did not. He failed that polygraph examination.

Q. What happened after that?

A. Then after he failed it, he was confronted with the fact that he had failed it. And he said that he had—that there was another person involved, this intermediary, and that that intermediary also got some money. But he would not at that point, without certain assurances, would not disclose the identity of the intermediary.

. . . .

Q. And because he hadn't divulged to you that there was another party involved, Senator Lindsay—

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[29]The late Thomas Magnum, a member of the South Carolina House of Representatives.

A. Exactly.

Q. —he showed deception?

A. He showed deception. At that point, I put him on the telephone with Agent Clemens, and together they worked out an arrangement where the government, if he gave us the identity of the intermediary, where the government would not use his statement against that intermediary, ...

. . . .

A. Okay. After it was worked out and it was agreeable to Agent Clemens and agreeable to Mr. Cobb, at that point he wrote down "Jack Lindsay" on a sheet of paper. I'm talking about Mr. Cobb—showed it to me, and then crumpled the piece of paper up and threw it in the trash can.

. . . .

Q. And when you tested him about the payoff to Representative Mangum, after he divulged to you that Senator Lindsay was the intermediary, how did Mr. Cobb do?

A. He passed the second test.

[*Id.* at pp. 111-19]. This testimony alone refutes the government's argument that "Cobb has consistently adhered to his subjective view of the facts during the investigation . . . [Gov's Post-Hearing Memo, 10/18/96, p. 23], and that "the defendants do not and cannot show perjury by Cobb as to his subjective beliefs, . . . [*Id.* at p. 26].

At this same hearing on February 28, 1991, Gordon furthered the argument that, if the government had any 302 regarding Cobb's payoffs to Lindsay, the defendants were entitled "to know if they have talked to Mr. Cobb and he's indicated these illegal payoffs." To this, the government replied: ". . . if he's looking for the secret 302 of Ron Cobb where this is discussed, *it does not exist*. There is no such 302 concerning that. . . . But there are no 302's or statements from Cobb concerning this particular instance involving capital gains tax." [*Id.* at p. 11-2].

At this hearing, SA Clemens was also examined under oath by Gordon as to the existence of any FD-302s Clemens might have prepared concerning Cobb's involvement with capital gains. The record reads as follows:

> Q. Mr. Clemens, I know you said you only briefly discussed it, but apparently y'all had some discussion about Ron Cobb's involvement with the capital gains tax legislation. Did you do a 302 or anything concerning that debriefing of Mr. Cobb?
>
> A. No.
>
> Q. Do you have any rough notes of it?
>
> A. No. . . .

[*Id.*, Exh. D, p. 36-7].

Mr. Barton concluded on this subject with the statement: "There are three 302's and two volumes of Grand Jury testimony, that is the only thing that the government has from Mr. Cobb." [*Id.*, Exh. C, p. 18]. As mentioned elsewhere in this order, copies of checks from Cobb's business account payable to Lindsay were also in possession of the government,

but they were not furnished to the defendants at that time. Although Cobb testified that he sometimes wrote checks to legislators from his personal account, there is no evidence the government ever sought to obtain these records.

On November 29, 1993, following remand of these cases for retrial, the government furnished for the first time an FD-302 of an interview of Cobb by SA Clemens dated September 25, 1989, in which the payments to Lindsay by Cobb with regard to the capital gains tax bill were characterized as "payoffs." This is the "secret" FD-302 that's existence was previously denied by the government. This 302 was found by defendants in the November 29, 1993, discovery in a file marked "KOHN 1" and is one of the two undisclosed 302s on which the Office of Professional Responsibility (OPR) Report focused.

The defendants take the position that SA Clemens' testimony that he had never prepared such a 302 was perjury and that the prosecutors were fully aware of the existence of that 302 and allowed the testimony to stand. SA Clemens explained to OPR investigators that he "forgot it ever existed," calling it a "garbage 302," [Hearing, 4/19/95, Defs. Exh. 45, pp. 32-3] and the government argues that this testimony should be excused inasmuch as this was Mr. Clemens' first time to testify at a trial. This is refuted by the defendants' argument that every witness is expected to tell the truth, regardless of whether or not it is their first time to testify.[30]

During the OPR investigation, it was disclosed that rough notes of the interview which led to the 302 of September 25, 1989, had been taken by SA Clemens to his home in the Washington, D.C., area when he was promoted and transferred

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[30]Defendants further contend that SA Clemens, in fact, had previously testified at an evidentiary hearing in open court.

to FBI Headquarters from Columbia, S.C.[31] These notes were eventually provided by Clemens to the OPR in 1994 during its investigation.

For this and several other infractions of FBI regulations, SA Clemens received a letter of censure, a five-calendar-day suspension, and six months' probation.

At the Taylor trial, Cobb was asked on cross-examination:

> Mr. Cobb, I want you to tell me right now whether or not you have ever given bribes or illegal money to Senator Lindsay?
>
> Answer: No, sir, I have not given Senator Lindsay any bribes or illegal money.

[Taylor Trial Tr., Vol. 3, p. 56].

The defendants argue that the government knew at that point in time that Cobb was committing perjury and they allowed this perjurious testimony to stand and to continue throughout the subsequent trials.

The government responds that, although it may have believed the payments of monies by Cobb to Lindsay were illegal, that Cobb's testimony could not be considered perjury because Cobb, himself, did not believe the monies to be illegal. The evidence now shows, however, that Cobb not only discussed payoffs in connection with the capital gains tax bill with SA Clemens, with Greer, and in the presence of Randy

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[31]These notes were among other Lost Trust investigation work papers Clemens maintained at his home in the Washington area.

Lee, all of whom knew that the Cobb payments to Lindsay were, in fact, illegal, but he admitted to SA Richards on May 1, 1989, that he paid $20,000 in illegal monies to Lindsay and Magnum for their influence in passing the oil jobbers bill.

Also in the record is a sworn Affidavit from SA Ronald L. Dick, who acted as the supervising agent at FBI-Columbia for much of this investigation, which affirms defendants allegations that the government was totally aware of the nature of the Cobb payments to Lindsay. In his Affidavit, Dick states:

> I recall the subject of the capital gains tax bill. My recollection is that there were other cooperating witnesses who were providing information regarding this issue. However, Cobb would never allow the payments Cobb made to state senator Jack Lindsay to be characterized as bribes. My position on this matter was similar to the old saying that if it walks like a duck, talks like a duck, and looks like a duck, then it must be a duck. After listening to Cobb try to characterize the payments made to Lindsay as anything other than bribery, I remain unconvinced. As an FBI agent, it was clear to me that the monies paid to Lindsay by Cobb were in violation of the Hobbs Act. Cobb, however, would never allow these transactions to be characterized as bribes. This was the subject of much discussion between SSA Clemens, myself and the USAO Office.

[Dick Affidavit to DOJ/OPR, 7/12/94].

A review of the UCO for the Lost Trust sting operation, then code-named Phaedrus, prepared by FBI-Columbia in September 1989 [Taylor's Third Supp. Memo, 3/28/96, Exh. 1, p. 10], reflects that almost the identical wording was used in the

UCO as that in SA Richards' FD-302 of May 1, 1989. [Hearing, 10/18-20/95, Taylor Exh. 2]. The names of both then-Supervising Agent in Charge James F. Denton, III, and SA Clemens appear on the Airtel which transmitted the UCO to FBI Headquarters.

The government maintains that it was absolutely necessary to redact Lindsay's name from both SA Richard's FD-302 of May 1, 1989, and from Randy Lee's FD-302 of August 14-21, 1990, to protect an on-going investigation. However, it is difficult to reconcile this reasoning with SA Clemens' interpretation that Cobb's reference to pay-offs to Lindsay were part of a "garbage 302" or with the testimony of SA Dick. Furthermore, the FBI relied in part on this information for authority to instigate the entire sting operation. The court simply cannot disregard Lindsay's prominent position in the politics of South Carolina and the obvious importance to both the FBI and the AUSO of information that he was involved in corruption. The explosive nature of that information, as well as information that Rogers, the Speaker of the House, and Greer, the Chairman of the State Development Board and, undisputedly, a close friend of Governor Carroll A. Campbell, Jr., were also involved, is revealed in an August 28, 1990, teletype sent from FBI-Columbia to FBI-Headquarters which requested authority for lobbyist Randy Lee to utilize electronic recording devices to monitor anticipated conversations with Greer. Greer, Lindsay and Rogers are the captioned subjects. That teletype reads in part:

> This request will require DOJ authority as sensitive circumstances exist in that captioned subjects are members of the South Carolina Legislature and high ranking State government employees. Three CWs hereafter referred to as CW-1 [Lobbyist Lee], CW-2 [Senator Lee] and CW-3 [Cobb] have provided information that bribe payments were made to

South Carolina State Representatives John Irby Rogers, III, and South Carolina State Senator John Charles Lindsay, in order to ensure the passage of certain capital gains tax legislation in the State of S.C. during the 1988-1989 legislative session.

. . . .

AUSA John Barton is aware of the facts of this case and fully concurs with the use of consensual monitoring. Entrapment is not an issue based upon the facts obtained thus far [sic].

[Hearing, 10/18-20/95, Gordon Exh. T].

These were "big fish," yet on February 28, 1990, Clemens testified concerning debriefings of Cobb about the capital gains tax matter that he had only "talked to him for a short period of time to get a general—general idea of what had gone on." [Gordon's Motion to Dismiss, 2/22/90, Exh. D, p. 37]. AUSA Barton was handling the discovery for the Taylor trial, and any 302 mentioning any one of these three subjects would certainly have been noticed by him, yet he denied the existence of the "secret 302."

At the Taylor pretrial hearing on October 11, 1990, and, in fact, at the subsequent hearings and trials in the entire Lost Trust matter, the court relied on the repeated representations by the government as officers of the court, that all the discovery to which the defendants were entitled had been turned over to them. The court is shown to have advised Taylor at his pretrial hearing: "Well, based on what Mr. DuTremble tells the court, you know, I don't know that they have anything else to give you, sir." [Taylor Trial Tr., p. 54]. The court then stated:

> . . . when he [the United States Attorney] answers them [*Brady* motion requests], and he's an attorney, signs his name down there, you know, just because he is a United States attorney, doesn't stop him from being an attorney, then I accept that just like I do any other attorney's signature. And they know what the ramifications are if they don't—done in accordance—.

[*Id.* at p. 59].

Just prior to Cobb's testimony at the Taylor trial, Taylor received a copy of Cobb's agreement with the FBI, the USAO, and the Office of the Attorney General of South Carolina. Taylor renewed his Brady motion that he be provided the actual details of all the crimes for which Mr. Cobb had been immunized under this agreement. The court, assuming that the government had disclosed all it had a duty to disclose, addressed Taylor's counsel as follows:

> . . . you know as much about the government's case as the government knows. Supposedly they have given you everything they have short of which they have not told you which witnesses they are going to call and what have you. Other than that, you have everything they have. I just don't know what it is you think I can do about it.

[*Id.* at p. 9]. Taylor, at this point in time, however, had none of the government's evidence of Cobb's pay-offs to Lindsay.

At the February 28, 1991, hearing, after AUSA Barton's denial of the existence of the "secret" 302, the court admonished:

> . . . all I can do is take them at their word, because they have always performed like most officers of the court do. . . . And Mr. Barton just said there are no 302's dealing with these matters which you talk about. And we are all aware that there are all kinds of ongoing investigations, and I'm sure if they already had them, he would have them and he would at least tell me that he had them and give them to me to look at and see if I thought he ought to have to give them to you.

[Gordon's Motion to Dismiss, 2/22/93, p. 14].

Later in that same hearing, the court stated:

> I have already told them to give you everything they have, and I don't know how I can do better than that. Now, if you find out they didn't give you what they had, then I will take appropriate steps there.
>
> . . . .
>
> Mr. Barton has been trying to tell us from the time we got started, kept standing up and I kept sitting him down, and then I was confident he was going to say, "*We have given them everything we have*," and that is what he eventually said. [Emphasis added].

[*Id.* at p. 17].

Although the record will reflect that other questionable government conduct surfaced with regard to the handling of the Lindsay matter, the government's problems with Lindsay's

involvement were mooted by his death. Rogers eventually pled. The record as to Greer, however, must be addressed.

3. The Capital Gains Tax Investigation and Richard E. Greer.

Greer was initially implicated in the Lost Trust investigation by the August 1989 FD-302 of lobbyist Randy Lee. Lee's FD-302, which resulted from interviews conducted by the FBI on August 14 through 21, 1990, reads in pertinent part as follows:

> LEE stated he recalled GREER saying "It is very big, it is important to a lot of people—it would help a lot of the Governor's friends." Lee stated that as the conversation continued, it became obvious to him that GREER had arranged for several wealthy individuals, who were staunch supporters of Governor CARROLL CAMPBELL, to invest a large amount of money to affect the rollback. LEE stated the money to be invested by several of the participants, arranged by GREER, would be paid as a bribe to insure that the rollback would take place.... LEE stated he learned that ROE, BRASIER and possibly a third party, had been quoted a fee of seventy-five thousand dollars each, by GREER. LEE stated he either heard GREER mention this amount during the initial conversation, or at a later date; however, it was later explained to him by COBB. LEE stated he has never been certain whether or not the third unidentified individual was to pay a particular sum of money; however, he was certain that GREER had arranged for COBB and Senator JACK LINDSEY [sic] to receive one hundred fifty thousand dollars from ROE and BRASIER

> in the event they were able to affect the rollback of the Legislation, which was disguised as a "proviso" within the Appropriations Bill.

[Taylor's Supp. Memo, 2/10/94, Exh. 7].

It is undisputed that USA Daniel and possibly SA Clemens, met with Greer and his attorney in Charleston, S.C., sometime in December of 1990. The defendants made repeated inquiries concerning the existence of a 302 or rough notes of this meeting. In its memorandum of October 18, 1996, the government reiterates that no such 302 exists and contends that the circumstances of that meeting "suggest that no 302 would have been done." [Gov's. Post Hearing Memo, 10/18/96, p. 35]. What the memorandum does not address, however, is Greer's testimony that he was interviewed "numerous" or, at least, "several" times [Hearing Tr., 10/20/95, Vol. III, p. 342]. Although his testimony of the precise number of interviews, the time frame of each, and the place of each interview was never made completely made clear, Greer stated that on at least two occasions subsequent to the initial meeting he was interrogated extensively by the FBI for several hours. *Id.* at pp. 362-6. A 302 of one interview with Greer in April 1991 dealing exclusively with his drug usage was furnished the defendants in discovery. If Greer testified truthfully that at one or more of these interviews he discussed the capital gains tax issue and his willingness to testify against Lindsay, then it would appear to the court that at least one 302 should have been prepared in connection with capital gains.

Greer pled guilty to a drug charge and was sentenced by this court in July of 1991. At his sentencing hearing, the government argued for a downward departure from Greer's sentencing guidelines; and SA Davis, in the presence of USA Daniel and AUSA Barton, stated to the court:

> Your Honor, last Christmas, the FBI approached Dick Greer for the first time in connection with our drug investigation of Mr. Greer. This was prior to the Jack Rogers indictment. At that time Mr. Greer provided us with information concerning the capital gains tax investigation. Mr. Greer essentially told us that Lobbyist Ron Cobb had approached him and told him that he needed more money to pay off both Jack Rogers and Senator Jack Lindsay in connection with the capital gains tax bill. He told us this is the first time that he knew that Ron Cobb—that what he was doing was illegal.
>
> Mr. Greer was willing to testify against Mr. Rogers should he have been brought to trial and was in fact scheduled to testify against Mr. Rogers. Also Mr. Greer was willing and scheduled to testify against Senator Jack Lindsay in connection with this investigation. I think the investigation certainly would have resulted in an indictment should Mr. Lindsay have lived.

[Hearing, 10/18-20/95, Gordon Exh. M, p. 13].

AUSA Barton informed the court at that same hearing:

> . . . we were able to bring the people in there and determine that other than Ron Cobb, Jack Lindsay and Jack Rogers, there was no illegality with any piece of capital gains legislation. That illegality was only applicable to the retroactive affect of capital gains and had nothing to do with what the governor's number one priority of the Legislature was, changing the perspective (sic) capital gains rate. We find other than, as

> I described to you, Cobb, Lindsay and Rogers, we find no corruption, no undue improper influence, no money changing hands with regard to any of the capital gains bills.

[*Id.* at p. 11].

During the arguments for a downward departure for Greer, it became apparent that this court was poised to deny the motion, and AUSA Barton requested an *in camera* hearing to furnish the court with additional information. It was at this *in camera* proceeding that USA Daniel and AUSA Barton presented, in some 16 pages of transcript [*Id.*, Exh. L, pp. 34-49], the argument to the court that Greer had been of invaluable assistance to the government in explaining that two capital gains tax bills were before the Legislature, a "retrospective" or "rollback" capital gains tax bill and a "prospective" capital gains tax bill; that Greer had clarified the difference between the two, and that it was the passage of the "prospective" bill in which the Governor and his staff were actively engaged. USA Daniel and AUSA Barton informed the court that the information given the government by Randy Lee had been misleading and that it was Greer who was able to put the government investigation on the proper course that led the government to close its investigation on capital gains. In this regard, it is interesting to note that SA Davis, who, with SA Clemens, was present at the December 1990 meeting, told the OPR investigators that the first time he and Clemens ever heard this explanation of the "prospective" bill was at the Greer sentencing. Davis and Clemens were the two FBI agents most involved in the Lost Trust investigation.

The defendants allege that Greer perjured himself before the Grand Jury and in the presence of USA Daniel. In the interim between the Christmas 1990 meeting with Greer and his sentencing hearing in July 1991, Greer testified on May

23, 1991, before the Grand Jury; and, in response to inquiry from AUSA Barton, he testified:

> Q. Were you aware of any monies paid to any legislators in [an] effort to influence their vote in connection with the capital gains rollback bill?
>
> A. No.
>
> Q. How about in connection with the Governor's change, the bill that was his priority?
>
> A. Absolutely not.

[*Id.*, Exh. K, pp. 14-5].

It is obvious from the government's argument for a downward departure for Greer that Greer had knowledge as early as December of 1990 that payoffs had been made by Cobb to Lindsay and Rogers. USA Daniel, who was present at the Christmas 1990 meeting, and who was, or should have been, privy to information given at other debriefings of Greer, was also present when AUSA Barton questioned Greer before the Grand Jury. Daniel did nothing to correct Greer's testimony that he was not aware of any illegal payoffs to legislators. AUSA Barton, in his interview with the OPR, provides the speculation as to why Greer responded as he did to the subject question before the Grand Jury. He opines that Greer might have felt justified in a negative response to the wording "*Were* you aware . . .," whereas a positive response would have been forthcoming to the question had it been phrased "*Are* you aware. . . ." Greer's later statements in the record would tend to confirm that suggestion. This play with semantics, however, appears to the court to be totally without merit.

In spite of the government's reliance at Greer's sentencing on the information given by Greer, no notes or FD-302s or written memorandums of any kind have surfaced of any debriefings of Greer with regard to capital gains.

Also, in its *in camera* argument for Greer's downward departure motion, the government asserts that it was Greer who provided the names of those persons who could testify before the Grand Jury in support of Greer's version of the capital gains tax bills. The government states in its October 18, 1996, memorandum that "the evidence showed that the government actively pursued the three identified subjects of that investigation [capital gains]: Dick Greer, Lindsay and Jack Rogers." [Gov.'s Post-Hearing Memo, 10/18/96, p. 27]. The court disagrees. Greer, himself, was never polygraphed and no FD-302s or other written memorandums exist. The government further affirmatively states that Greer did not receive money in connection with capital gains legislation. [*Id.* at p. 28]. There is nothing is the record to show that the government's "active pursuit" of Greer included a review of Greer's financial records. It appears that the government simply accepted Greer's version of events and characterized the information given by Randy Lee as "speculative" and "misleading." Although at the Greer sentencing hearing it was indicated that the government was "misled" about the capital gains matter by this information, Randy Lee was the beneficiary of a downward departure motion by the government at his sentencing hearing on January 13, 1992, based on his substantial assistance to the government. The court has difficulty in reconciling the government's position—that Mr. Greer's "substantial assistance" served to correct its misconception about the capital gains tax bills and allowed it to put the capital gains tax investigation to rest—with its position that Randy Lee provided them with

"substantial assistance," when it now claims Lee misled them into a lengthy and expensive investigation.[32]

Further, at the sentencing of Lost Trust defendant Senator William Richard Lee on December 3, 1990, the government requested an *in camera* hearing for its argument in support of its downward departure motion. At that time, AUSA Barton stated:

> Your Honor, specifically after Mr. Lee gave us those revelations about the push that was put on we started looking at some of the individuals who we had some suspicion about and specifically I would anticipate the government seeking an indictment against Representative Rogers, probably this month, for the acceptance of money in connection with his vote and work on the capital gains bill. There is substantial information about Senator Lindsay as well and his acceptance of money for his vote and support in connection with the capital gains bill.
>
> So based on what Mr. Lee gave us and the sort of a kick-off, if you will, we caught the ball and ran with it and have run into some pretty good areas that will very definitely result in charges brought against—I can affirmatively represent to you against Representative Rogers as a result.

[Hearing, 10/18-20/95, Gordon Exh. J, p. 4].

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[32]The court is aware that the government claims that Lobbyist Lee was helpful to them in the Derrick case.

Senator Lee informed the court, *in camera*, through his attorney, that he was present at a meeting of Republican legislators with the Governor and his staff in the spring or early summer of 1988 where he was told

> to back this bill. It is the most important piece of legislation to the governor's office for this legislative year. If anybody raises a question about it, you are to sweep it under the rug. A list was given to him on how to handle any tricky or difficult questions, a script.

[*Id.* at p. 9].

If the reference by the Governor's Office to this "most important" legislation was a reference to the "prospective" capital gains tax bill as described by Mr. Greer, and not to the "retroactive" proviso in the Appropriations Bill, which allegedly would have been extremely beneficial to some of the Governor's friends and contributors, what would have been the need to "sweep under the rug" any tricky questions.

The information provided by Senator Lee is consistent with the FD-302 of Lobbyist Lee wherein he referred to a meeting the Governor had with Republican representatives sometimes after early May 1988 in which an "answer sheet" was distributed to the attendees.

A discussion of the capital gains tax investigation would not be complete without mention of a bizarre incident which came to light during the OPR investigation. Prior to the OPR investigation, the transcripts of four of the five persons who testified before the Grand Jury with regard to capital

gains[33] disappeared from a file cabinet at the U. S. Attorney's Office and later appeared, unexplained, in AUSA Barton's desk drawer. This disappearance has never been explained or, to the court's knowledge, ever been fully investigated.

4. Visit by Cobb and SA Clemens to Home of Steven H. Smith and Telephone Call to Lindsay.

Subsequent to the drawing of the Blanding/Gordon jury and prior to the commencement of opening statements, early on the morning of February 27, 1991, defendants filed a motion to dismiss for prosecutorial misconduct and requested an *in camera* hearing out of the presence of the government in order to proffer certain information. The hearing involved the unredacted copy of a 302 by SA Richards on May 1, 1989, only received by defendants Blanding/Gordon on February 22, 1991, which defendants alleged substantiated that Cobb not only committed perjury at the Taylor trial, but that the government was aware that he was testifying falsely. [*See also,* V-2 of this order]. The motion further involved the defendants allegation that Cobb committed perjury before the Grand Jury with regard to his drug usage, and that information substantiating that charge only came to light as the result of *Brady* material furnished the defendants by an order of the court on February 14, 1991. In setting out these allegation, Gordon's attorney then addressed the information he wished to proffer concerning conversations he had over the previous two days with defendant Taylor's attorney. After some discussion about how the information should be handled, the court called for Taylor's attorney, as an officer of the court, to appear before the court and make a statement. In his statement, Taylor's attorney

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[33]The only Grand Jury transcript regarding capital gains not removed from the AUSO's file cabinet at this time was the transcript of Greer's testimony which had been previously pulled from the files.

recounted how, through a Columbia attorney, Dwight Drake, he had learned that Cobb and an FBI agent had visited the home of a Steven Harley Smith in the early morning hours just prior to Taylor's trial. He stated he recognized the impact this incident could have on the Blanding/Gordon trial and had contacted Gordon's attorney, He stated that several attempts had been made to contact Smith, and that he learned through Drake that Smith was reluctant to get involved. His statement included the following as having been told to him by Dwight Drake:

> And he said that Mr. Ron Cobb and an FBI agent—and he did not name the FBI agent, but he said an FBI agent brought him—that the two of them came by Steve Smith's house. He said that they—they had a conversation wherein they acknowledged that Senator John Lindsay of Bennettsville was very ill and that his wife was restricting his telephone calls and that it was difficult for just anybody to call and speak to Senator Lindsay.
>
> And they knew that Steve Smith was a very close friend of Senator Lindsay, and according to Mr. Drake Steve Smith was asked by Ron Cobb, or the FBI agent, or both, to place a call down to Bennettsville to the Lindsay residence, and using his friendship, they felt sure he could get through to Senator Lindsay, that his wife would let him talk, and apparently that is what did occur.
>
> And according to Dwight, who told me this now, the 25th, there was a conversation between Mr. Cobb and Senator Lindsay which he overheard at least one end of. And it had to do with how he should characterize some

money that had been given by Ron Cobb to Senator Lindsay.

And apparently there was some discussion about whether that money could be characterized as a legal fee. And at the end of the conversation, you know, they left.

[*In camera* Hearing Tr., 2/27/91, pp. 31-2].

The following day, the hearing continued *in camera* with the attorneys for the government present. In addition to testimony of SA Richards as to the circumstances surrounding his 302 of May 1, 1989, and the testimony of both Cobb and SA Clemens as to Cobb's drug usage (both issues being addressed elsewhere in this order), both Cobb and SA Clemens testified with regard to the visit to the Smith home.

The exchange on direct of Cobb by Gordon reads as follows:

Q. If the monies that you gave Senator Lindsay were legitimate fees, then why did you have to make a deal that you wouldn't have to testify against Senator Lindsay? What had he done wrong, if there were no illegal monies passed to him.

A. Well, from—from my interpretation of the conversation with the FBI, they had other things going that I wasn't aware of.

Q. Well, Mr. Cobb, if you weren't aware of them you couldn't testify about them, could you?

A. That's correct.

Q. So, that couldn't have been the reason for your agreement with the FBI that you wouldn't have to testify against Senator Lindsay?

A. Well, obviously, I told—obviously I told them the truth about the Magnum thing. And from their vantage point that would be a problem for Senator Lindsay.

Q. So, now, the FBI told you it was a problem for Senator Lindsay?

A. No, they didn't tell me it was a problem, this is my own—I say that, I'm thinking this. Remember, this is back nearly two years ago when—you know, you are refreshing me through this stuff.

Q. I understand that. I don't have any problem with that. We will take as long as it takes.

Before you agreed to talk to the FBI about anything, you told them, "I'm caught, I will cooperate, I will talk to you about political corruption, but I won't testify against Jack Lindsay," did you not?

A. I won't do anything against Jack Lindsay, that's correct.

Q. And that included testifying?

A. That's correct.

Q. If you had not done or committed any illegal acts with Jack Lindsay, or if you had no knowledge of Jack Lindsay participating in any

illegal acts, it wasn't necessary for you to have that agreement with the FBI, was it?

A. My agreement was that I didn't have to testify against Senator Lindsay. Now, as to anything that he had done—I know what you are getting at—as far as anything that he had done, no, I'm not aware of it, but had there been I wasn't going to be involved in doing anything against the Senator.

. . . .

Q. And how did it come about that you contacted Senator Lindsay?

A. Because the $10,000 to Magnum was—I was going to have to testify to that in court. Senator Lindsay was laying up in the hospital bed dying, and I called. I'm—I had a very close personal relationship with him, and I know this is going to hurt him. And I don't want to hurt him, for this to come out, so I was going to minimize it.

. . . .

And I couldn't tell him about it, so I got Mike Clemens to, because I couldn't tell him what I was going to testify to and I didn't. Mike Clemens told him what was going to come out, and so it prepared Senator Lindsay for what was going to come out.

Q. Isn't it a fact, Mr. Cobb, that the reason you called Senator Lindsay was to determine how you should characterize the $10,000 you gave to him?

A. That is absolutely not true.

[Gordon's Motion to Dismiss, 2/22/94, Exh. E, pp. 22-8].

The hearing transcript of February 28, 1991, will show that SA Clemens testified about that call to Lindsay on direct by Gordon as follows:

> Q. And y'all were discussing the fact that Mr. Cobb would probably be cross-examined concerning this $10,000 payoff that he had made to Representative Magnum through Senator Lindsay, correct?
>
> A. That's correct.
>
> Q. And the $10,000 that he gave Senator Lindsay to deliver the money to Representative Magnum?
>
> A. The monies he had paid Mr. Lindsay, yes..
>
> Q. And during that discussion, Mr. Cobb indicated that he needed to go call and explain to Senator Lindsay what was going on, is that how it came about?
>
> A. Pretty much. . . . He wanted to make sure that Mr. Lindsay was aware that it was going to come out.
>
> Q. And Mr. Cobb was concerned that Mr. Lindsay, Senator Lindsay would find out that he, Mr. Cobb, had told the government that he had made these different payoffs to Senator Lindsay, correct?

A. He was concerned about that information, yes.

[*Id.*, Exh. D, pp. 24-5].

The record in the Taylor case was supplemented with the *in camera* proceedings in the Blanding/Gordon case, and at a motion hearing to reconsider Taylor's bond pending appeal held April 11, 1991, the court allowed Taylor to present the testimony of Steven Smith, who appeared under subpoena. In his testimony, Smith confirmed that he received a telephone call and a subsequent visit from Cobb and SA Clemens during the early morning hours of October 17, 1990. He stated that "the Senator was not receiving telephone calls from basically anyone at the time. However, due to our friendship and closeness he would accept phone calls from me." He testified that due to the early morning hour he called the Senator's son and asked him to have Lindsay call him. In a further recitation about what transpired that night, Smith testified:

A. Well, what was occurring is this. Mr. Cobb was insistent upon—and this was the problem which was being addressed. Mr. Cobb when he arrived was insistent upon labeling any exchange of money which was to be brought up in testimony or questions in the case, Mr. Cobb intended to call that a legal fee. Whether it was or wasn't I don't know and was not familiar at the time with what exchanges of money they were talking about.

Mr. Clemens was insistent to Mr. Cobb that he not label it a legal fee, but that he—I believe the term to be used was call it what it was. Now, that can't be quoted, but Mr. Clemens was trying to move Mr. Cobb away

from the legal fee label to what Mr. Clemens thought to be the truth.

Mr. Cobb was resistant to doing that and was very upset that he was being asked to do that. It looked like, sounded like to me when he got there that Mr. Clemens had prevailed in his persuasiveness but Mr. Cobb had placed upon that as a condition or said he would do it if Senator Lindsay gave him the okay or that he knew that Senator Lindsay would not be upset with him for doing that. The purpose of the telephone call was to get Senator Lindsay on the phone so that Mr. Cobb could talk to him and hopefully seek that permission so that Ron could be convinced to go ahead and tell what Mr. Clemens thought was based on whatever information it was they thought to be the truth.

. . . .

. . . . When Ron hung up the phone what he said was he told me—and I think this is accurate. Again, it is the middle of the night--something to the effect, "To do what I had to do."

. . . .

A. That evening sitting in the breakfast room. . . . I asked him I said, "Ron, what is all of this about?" . . . .

He told me then. He said, "I told you, Steve, they had us jammed up on the oil jobbers bill."

[Taylor Bond Hearing Tr., 4/11/91, pp. 20-1, 26].

Mr. Smith again testified under subpoena on October 18, 1995, at a hearing on the instant motions to dismiss:

> A. The issue between Mr. Cobb and Mr. Clemens was the testimony that Mr. Cobb was to give I believe the following day, if my memory is correct, in a trial, with regard to how Mr. Cobb would classify monies that were alleged to have been passed between Mr. Cobb and Senator Lindsay. I don't know what the monies were or anything, but they called them monies.
>
> Mr. Cobb was intending to, as related to me, and Mr. Clemens related that as well at some point during our conversation, that Mr. Cobb was going to classify whatever those monies were as an attorney's fee and that he had been authorized to do that by the United States Attorney.

[Hearing, 10/18/95, Vol. I, pp. 221-2].

Smith's appearances before this court on these two occasions were under subpoena and his testimony was consistent. And, although Mr. Smith's opinion of the events was that SA Clemens was attempting to persuade Cobb to tell the truth when he testified, it also indicates that SA Clemens, himself, was not entirely truthful in his testimony at the hearing on February 27, 1991, when he described the purpose of the visit as one only to give information to Lindsay. Further, it indicates that Cobb also was not truthful in his testimony at the February 1991 hearing. The court must agree with the defendants' assessment that Lindsay was no stranger to publicity, and a notice to him that his name might appear in the

media as a result of Cobb's testimony would certainly not warrant a telephone call to a dying man in the middle of the night. The involvement of an FBI agent in this entire incident was—and is—hocking to this court.

Equally shocking is Cobb's testimony during the hearing on these motions on October 19, 1995. As a result of Smith's testimony that there was an argument between Cobb and SA Clemens as to whether Cobb would "classify whatever those monies were as an attorney's fee and that he had been authorized to do that by the United States Attorney," the defendants called Cobb as a witness. Taylor on direct queried:

> Q. Mr. Cobb, my question to you is, did the United States Attorney tell you that you had his permission to label moneys that you had given Mr. Lindsay as legal fees?
>
> A. I had indicated to them that I would call the moneys anything they wanted me to call it, but I won't call it a bribe, and the terminology legals [sic] fees or contributions came up, and it was discussed, and I wasn't told not to use it.
>
> Q. Mr. Cobb, didn't you tell us in Mr. Spears'[34] office that you had a conversation with the U. S. Attorney and that he had told you it would be all right for you to call any money you gave Senator Lindsay a legal fee?
>
> A. Mr. Collins, that was in the course of our conversation, and as you will recall, we discussed that for a little while and I think I

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[34]Michael E. Spears, an attorney representing Cobb at that time.

relayed to you that it was discussed, and I wasn't told not to, nobody ever said, you know—nobody ever said, say this, or say that. I implied that I wouldn't say that it was a bribe, and they indicated that I could call it something else, and a legal fee was one of those terms.

. . . .

Q. . . . . Mr. Cobb, did Mr. Daniel, former U. S. Attorney, ever tell you that it was all right with him for you to call any moneys you gave Senator Lindsay legal fees?

A. It's really tough to answer that yes or no, without explaining—

. . . .

THE WITNESS: In course of conversations, the terminology, legal fees, came up. It was maybe suggested that that would be a possibility, because I was adamant about not calling any moneys I gave Senator Lindsay bribes, which I didn't, and don't to this day, but, yes, the term legal fees, by the U. S. Attorney was mentioned as something I could call it.

[Hearing Tr., 10/19/95, Vol. II, pp. 24-5].

On cross-examination by the government, the exchange with Cobb on this subject continued:

Q. Did Bart Daniel ever tell you you could call it legal fees?

A. I have told you that's a very difficult question to say yes. In course of conversations it came up where I could call it legal fees, contributions, or what have you.

. . . .

THE WITNESS: Nobody ever programmed me to do that, but in the course of the conversation, it came up that it could be called a legal fee, it could be called contributions, but I wasn't going to call it a bribe.

. . . .

Q. Who told you that, sir?

A. I just told, you several people in the U. S. Attorney's Office.

Q. Tell me the name of the person who told you that?

A. It could have been anybody in the U. S. Attorney's Office, Bart Daniel, John Barton, Dale DuTremble.

Q. Who?

A. Maybe all of the above.

Q. Who?

A. I would leave it all of the above in the course of conversation.

[*Id.* at pp .43-4, 46-7].

Contrary to the government's argument that "the defendants contend that Cobb had been given permission to call money he gave to Lindsay 'legal fees," [Gov.'s Post-Hearing Memo, 10/18/96, p. 25], it is Cobb who contends this in his sworn testimony. In his interview with the DOJ/OPR on September 8, 1994, USA Daniel responded to this allegation: "I don't know why Cobb would say it. It never ever happened." On May 26, 1994, AUSA Barton told the DOJ/OPR: "I recall nothing about someone coming up and saying to me Hey, Cobb asked if it was ok to call his payments to Lindsay a legal fee." And the notes of a telephone interview of AUSA DuTremble by the DOJ/OPR on November 10, 1994, show: "No recollection of Bart D. or any AUSA authorizing Cobb to call payments to JL 'legal fees' as recalled by Steve Smith—Surmises that Cobb may have interpreted USAO's position on the payments—'You can call it anything you want to'—as auth to characterize it as a 'legal fee'."

Although there is no sworn testimony in evidence to refute Cobb's claim, this court is loath to give credence to Cobb's testimony over the statements of these prosecutors. Although it does not make a specific finding as to Cobb's truthfulness in this regard, the court has no reason to dispute Smith's testimony that Cobb did, in fact, make the statement.

5. Drug Usage by Cobb.

The defendants have argued extensively about Cobb's drug usage during the course of this entire matter. First of all, they complain of the withholding of evidence of his drug usage in possession of the government which was not furnished to them, thus hampering their efforts to impeach Cobb. Secondly, although they appear to argue that his drug usage may have affected his handling of the sting operation and his testimony, there is no real evidence that Cobb was, in fact, under the influence of drugs during these times. Thirdly, they utilize his repeated drug usage to bolster their argument that the

government failed to control the actions of a confidential informant in violation of FBI regulations; and, fourthly, they argue that the government's indictment of Cobb on two drug violations just prior to the Blanding/Gordon trial placed Cobb in a position to take the Fifth Amendment and further hamper their impeachment efforts.

Cobb was first approached by the FBI on April 28, 1989, and within a day or two became a paid confidential informant. A formal agreement was not entered into with the government until October 11, 1989.

On February 21, 1991, Cobb was indicted on two misdemeanor drug counts (21 U.S.C. 844(a)), for possession of cocaine on February 2, 1990, and January 11, 1991. He pled guilty to both counts on April 10, 1991.

Cobb's drug usage on the dates of October 13, October 18 and November 18, 1989, was disclosed at the trials. In addition, the indictment for possession of cocaine on February 2, 1990, and January 11, 1991, was returned a few days prior to the Blanding/Gordon trial, and Cobb was allowed to invoke his Fifth Amendment rights as to these two incidents during his testimony at that trial. Cobb pled guilty to these incidents prior to the Derrick and Long trials. SA Clemens testified that he admonished Cobb on the three occasions in late 1989 that his drug usage was not only illegal, but was in violation of his agreement with the government; however, the government did not charge him or discontinue his employment.

On July 17, 1990, Cobb testified before the Grand Jury that he had not used drugs since late 1989. Count One of the indictment to which he pled guilty would show his possession

of cocaine in February of 1990;[35] therefore, this testimony, by Cobb's own admission, is false. In addition, Count Two of the indictment to which he pled guilty would show his possession of cocaine in January of 1991, which is within the time period between the Taylor trial and the Blanding/Gordon trial.

The full scope of Cobb's drug usage was often sought by the defendants in their quest for discovery materials which might impeach Cobb's testimony at defendants' trials. On November 29, 1993, the defendants received a minimum of six FBI documents which revealed that Cobb had been under investigation by the FBI for drug violations since early 1988 [Taylor's Supp. Memo, 2/10/94, Exh. 2], and that he had used cocaine on at least two other previously unknown occasions in May of 1989, after he went to work for the FBI [*Id.*, Exh. 3]. Several of these documents indicate that Cobb was reputed to be a cocaine "trafficker" and implicated others, such as Greer and Kohn.

In contrast to representations by the government on the record in open court that they had given the defendants each and every tape they had [*see* Hearing Tr., 4/19/95, pp. 9-11], some 50 audiotapes and 118 FD-302s, which contain evidence bearing on Cobb's drug usage and trafficking, were received by defendants in February of 1995 [Taylor's Second Supp. Memo, 8/25/95, pp. 21-2].

It is now evident that Cobb had the reputation of a cocaine user and/or dealer and that this was known to the government prior to their employment of him in the sting. It is also evident that he purchased and/or used cocaine at least periodically during the time he was employed in the sting

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[35]This incident took place only three (3) days prior to his meeting with defendant Taylor regarding Taylor's support of the parimutuel bill.

through the times he testified at the Taylor trial and at the Blanding/Gordon trial.

In his testimony regarding his drug usage, Cobb gave as reasons for the drug usage on which he was questioned as the need to protect his cover and, for one occasion, the emotional effect of the death of Lindsay. Cobb also claimed that the drug deal for which he was initially approached was done solely for the purpose of getting funds to pay his wife's medical bills. Just prior to his trial, Taylor offered to the court an affidavit by Cobb's wife, which was placed under seal, where she affirmatively stated that Cobb did not, in fact, contribute to the payment of her medical bills.

All of the defendants, possibly more so Taylor, Blanding and Gordon, were unable to impeach Cobb's testimony and confront him with the fact that he had been involved in drugs on more occasions and over a longer period of time than disclosed, and that his involvement in drugs was so deep that he had earned the reputation of a "trafficker." This information was, of course, known to the government since at least February of 1988.

6. ***Evidence re Kohn.***

Kohn's involvement in the extensive use of cocaine and alcohol was admitted by him during the trials. On December 6, 1989, Cobb, as a government informant, participated in the videotaping of an occasion on which he purchased $500-worth of cocaine from Kohn. Kohn is then shown on the tape using cocaine. This tape (#7) was not turned over to the defendants until sometime around the Derrick trial; however, Taylor concedes that he received a letter from the government very shortly before trial telling him that the government had evidence of Kohn giving cocaine to Cobb. He argues that he was deeply involved in preparing for trial; and, that since this is all that he was told, he did not take the time to pursue it. He

indicates that had the government disclosed to him that a sale was recorded on video tape, and had he been told of the large amount of the purchase or that the tape showed the actual use of the cocaine by Kohn, he would have recognized its significance. Taylor contends that the jury's assessment of Kohn's credibility could well have been impacted by actually viewing Kohn "snorting" cocaine.

Although it is the government's responsibility to disclose evidence to the defendants in a timely and honest manner, it is also the responsibility of the defense to review that evidence when it is disclosed. The reference by the court to this particular issue, therefore, is not to excuse Taylor's failure to review the tape, but simply to show the cumulative effect on the defense of potentially impeachable material not being fully or timely disclosed.

The defendants argue that during the Taylor trial, in response to Taylor's effort to impeach Kohn, the government misled the court as to the relevancy of the issue of a personal insurance settlement by Kohn following Hurricane Hugo. The government objected on relevancy grounds when the defense attempted to cross-examine Kohn as follows:

> Q. Did you have an insurance claim personally?
>
> A. Yes, ma'am, I did.
>
> Q. Was it on your house?
>
> A. Yes, ma'am, my home.
>
> Q. How much did you receive for that? Was it $100,000?
>
> A. No it was not.

Mr. Daniel: Your Honor, I object as to the relevance.

The Court: It doesn't sound too relevant, Mrs. Courie.[36]

[Taylor Trial Tr., Vol. IV, p. 141]. What the government knew, but was unknown to the defendant Taylor and the subsequent trial defendants, was that there existed a tape (Tape #98), made on April 26, 1990, of a discussion between Cobb and Kohn which would have gone directly to Kohn's credibility. Cobb inquires about Kohn's weekend plans and the conversation continues:

Kohn: Ah, I'm not sure. I got a—It ain't nothing exciting, just try to get caught up on a couple (unintelligible) in Charleston and get all my stuff together for my financial insurance settlement.

Cobb: Mm, hmm.

Kohn: Now that was the greatest scam I've ever pulled off. Turned a $500 claim into a $100,000 settlement.

Cobb: Wow. That would be your hit for the year.

Kohn: Mm, hmm.

Cobb: A nice one.

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[36]Yolanda C. Courie, co-counsel for defendant Taylor.

> Kohn: Insurance is (unintelligible) I, set this company up. I mean I set the insurance company so there is nothing they can do on it.
>
> Cobb: Huh?
>
> Kohn: Set them up the whole way through and, uh, said well I need to bring my dad into contract. He says you don't need to bring anything. See I don't understand the instructions. I don't understand. He said all we're gonna talk about is how much money they're gonna give you. You see, the, the high, the lowest figure they're talking about borders in my range. (Unintelligible). I think I got them on unfair claims. (Unintelligible).

[Audiotape #98, 4/26/90].

The defendants refer to this tape as "devastating" evidence, which was not furnished to them until after this court's order of November 9, 1994. As well as being evidence material to the impeachment of Kohn, the first part of this same tape records a meeting concerning the pari-mutuel bill. The tape is unintelligible for the most part in this regard; however, it is significant that the cover sheet (FD-302) specifically lists Taylor as one of the speakers. It is impossible, therefore, for the court to understand how the government could consider this particular tape "irrelevant."

It is well established that the government must often take its witnesses as it finds them. Yet in this case, Kohn was not only employed by the government as a confidential informant after he was approached by the FBI in May of 1990, but he was used to assist Cobb in actively soliciting fellow legislators and became a significant player in the sting operation.

7. *Control of "Sting" Operation by Cobb.*

Another of the defendants' allegations is that the government lost control over Cobb, its primary undercover informant. The Fourth Circuit Court of Appeals has referred to Cobb as the "cornerstone" of the government's case. The defendants allege that under the regulations governing this sting, Cobb was forbidden to go out looking for people to bribe—this was to be strictly an "open door" operation. Yet we see that Cobb on occasion chose the legislators he wished to approach.[37] He was admonished that he could not use drugs

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[37] In his motion to dismiss on the grounds of entrapment, defendant Derrick claims that Cobb added Derrick to his target list in revenge for Cobb's loss of a client when Derrick would not support legislation known as the "Tent Sales" bill. In post-remand discovery furnished to defendants there was found a government file dated April 30, 1991, which contained what appears to be a manuscript of a proposed book by Cobb entitled *The Second Burning of Columbia*. The manuscript is in the form of an interview of Cobb ("R") and his then-girlfriend, Shelly Adams ("S"), by "D", later identified by the government as Doug Williams. A portion of that manuscript reads as follows:

D You knew who they [the government] had files on going in? So there really was, there was a definite universe of people that you were charged with going after?

R Yeah.

D Did you add to that universe at all for the hell of it?

R Yeah. Paul Derrick big time.

[Hearing, 4/19/95, Taylor Exh. 7, p. 27].

during the course of the investigation, yet he repeatedly did so. It was Cobb who arranged the meetings with the defendants and notified the FBI when to turn on the video cameras. Cobb also convinced SA Clemens to participate with him in the very questionable 2:00 a.m. visit to Steve Smith's house and the telephone call to Lindsay.

The government originally paid Cobb $2,000 per month and later raised the amount to $4,000 per month. It is part of the record that these payments continued through the original trials, but it is unknown to the court whether these monthly payments are still being made. In addition, the government returned to him the $20,000 cash payment Cobb had made to an undercover agent in the cocaine investment deal that precipitated his involvement in Lost Trust. A $150,000 bonus for Cobb has been approved by the government; however, the last mention of this that the court can find in the record is that the payment was put on hold, and whether this bonus has ever been paid to Cobb is unknown to the court. If not, this bonus takes on some significance should he be required to testify in any retrials.

The court is of the opinion that Cobb maneuvered himself into the "driver's seat" position, and the government was a hostage to him. It is apparent that the government knew it had to "court" Cobb in order for him to work with them effectively. At times, he literally took over the investigation and directed its course. From its actions, it would appear the government was afraid Cobb would pull out of the investigation and ruin their cases. According to a statement SA Clemens made to the OPR, Cobb flatly told the government from the very beginning that he would not testify against Lindsay and they could just take him to jail. Thus, Cobb forced the government on several important occasions into conduct not acceptable to the court.

8. *Government "Targets" in Violation of "Sting" Guidelines.*

The portion of Cobb's manuscript cited above to show the control Cobb had over the investigation has also been cited by the defendants to show that Cobb was encouraged to use the sting operation to pursue individuals already targeted by the FBI in violation of FBI regulations and that selective prosecution was also an issue.

In a teletype from the Director of the FBI to FBI-Columbia, receive-stamped "'89 NOV -1" [Taylor's Third Supp. Memo, 3/28/96, Exh. 4], in which the Columbia office is notified that the use of the pari-mutuel bill in this investigation is approved, the Columbia office is cautioned: "Columbia should ensure that this scenario is executed pursuant to investigative plan outlined in UCO Proposal, i.e., a passive approach through contacts with predicated lobbyists." The defendants contend that this investigation was anything but passive.

At a hearing on April 19, 1995, Gordon published several pages from the Cobb manuscript, *The Second Burning of Columbia*.[38]

> COBB: B. J. Gordon, they had files on him; they had wanted him so f'n bad, they couldn't get him.
>
> D: Because they just didn't have the evidence?

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[38]The government did not oppose the publication of this selected portion of the manuscript. It did oppose full publication on the basis of protection of any copyright privilege Cobb might assert.

COBB: He had been to court two or three times. They had charged him two or three times. But he could always beat them. But he didn't outrun this boy.

D: And yet the FBI was okay with that? I mean the FBI—

COBB:-They wanted him bad, bad.

[Hearing Tr., 4/19/95, p. 24].

He then continues to publish:

D: Did you, the pari-mutuel, put on the table as the idea? My experience in Alabama is that pari-mutuel betting is a black issue. And you had to know when you put pari-mutuel betting on the table that you're going to have a skewed number of blacks. Did you know that? Did the FBI know that?

COBB: Sure they knew it. I knew it. Hell, if I knew it I know they did. But we didn't discuss about the numbers. I'd talk a lot of times, I would make the comment a lot of times that I could have the whole black caucus. There would be no more damn niggers. It was kind of funny to them for a while until we got half of them and they said, pull in the reins, but believe me, we could have had most of them. Because you throw out some dollars and the mother f's first are going to be knocking the doors down. They were easy. Even B.J. as much trouble as they had with him. Shit I got him. The way I got him, f, you don't get away from it.

[*Id.* at pp. 24-5].

The above statements by Cobb would certainly indicate that the investigation went far outside the guidelines set forth for this sting.

9. The Report by the OPR.

As hereinbefore mentioned, following the filing of the Taylor and Gordon motions to dismiss, USA J. Preston Strom, in February 1994, requested the Office of Professional Responsibility of the Department of Justice (DOJ/OPR) to investigate the allegations of prosecutorial misconduct raised by the defendants' motions. This procedure was unusual in that such investigations generally are not conducted by the OPR until after a judicial finding of misconduct.

The OPR "bifurcated" the investigation, requesting the FBI/OPR to investigate the allegations against SA Clemens. The DOJ/OPR then proceeded to address "only the USAO's failure to provide the two 302s complained of in both motions, those appearing to be the documents which raise the most serious misconduct issues." [Hearing, 4/19/95, Defs. Exh. 30, p. 10, ftn. 15]. These are the 302s dated June 22, 1989 and September 25, 1989 (the "secret" 302), which were not received by the defendants until November 1993. Both of these 302s dealt with Cobb's characterization of the cash payments he made to the defendants. Taylor's motion also included arguments of intentional wrongdoing in the government's failure to produce numerous additional documents, but the investigation did not address these. On December 6, 1994, the FBI/OPR reported its findings to the DOJ/OPR [*Id.*, Exh. 45], and the DOJ/OPR amended its report to include these findings on February 16, 1995 [*Id.*, Exh. 44]. The October 18th report concludes that, although

> "incremental mistakes and misjudgments were made by the FBI and prosecutors alike . . ., in our view, it is more plausible that these incremental failings rather than any intentional and wrongful decision to conceal led to the failure in the first two Lost Trust cases to provide the defense with the 302s dated June 22 and September 25, 1989."

[*Id.*, Exh. 30, p. 22].

The amended report of February 16, 1994, made a finding that sanctions against SA Clemens were warranted as a result of the following infractions:

> . . . failure to effectively discharge his duties as case agent in connection with the management of discovery documents transmitted to the USAO; his failure to properly review all of his interview reports to properly prepare for testimony; unintentional misrepresentation in trial testimony; failure to properly maintain investigative notes in accordance with Bureau rules and regulations; failure to inform either the USAO or the Bureau upon discovery of the interview notes and his subsequent neglect of duty to report such an action as required in light of the controversy surrounding his testimony; and failure to advise OPR of the interview notes.

[*Id.*, Exh. 44, p. 13]. The sanctions imposed have been previously cited in this order.

During its investigation, the OPR conducted numerous interviews, the notes of which, by order of the court, were furnished to the court and the defendants. The defendants have

vigorously contested the limited scope of the investigation and the report. They question the decision to focus on only two 302s in light of their numerous allegations; they contend that numerous interviews were not incorporated into the report, and that the report does not accurately reflect the results of the interviews conducted. The court must agree in that there is an obvious omission of any consideration of the statement given to the OPR by SA Dick that it was clear to him that the monies Cobb paid to Lindsay were in violation of the Hobbs Act even though Cobb would never allow these transactions to be characterized as bribes—and that this was discussed many times among SA Clemens, the USAO and himself. SA Dick, as the supervisor of the White Collar Crime section of the Criminal Division, was thus the supervisor of the Lost Trust investigation. His statement that these discussions frequently occurred do not appear to be taken into consideration by the FBI/OPR in its determination as to Clemens alleged perjury on February 28, 1991.

At the time the DOJ/OPR and FBI/OPR investigations took place, only the motions of defendants Taylor and Gordon were under consideration; joinder by defendants Blanding, Derrick and Long in these motions and the filing of Derrick's dismissal motion came later. Further, the motions of Taylor and Gordon address issues based on additional discovery received in November of 1993. Subsequently, the government was ordered by several court orders to furnish other materials, which have led to additional allegations of misconduct not addressed by the OPR.

The court has carefully reviewed all of the interview notes. Although it will not make a definitive finding of misconduct by the OPR, it does appear that many questions were left either uninvestigated and/or unanswered. Some of the pending allegations arose from additional discovery now in the hands of the defendants that was not before the OPR. The government continues to rely heavily on the findings of the

OPR; this court does not share in that view. Therefore, it is only in a limited context that the court has considered the OPR's conclusions.

The OPR report did reveal that the government rushed into the Taylor trial before it was prepared to go to court. AUSA DuTremble has cited "pressure by the Governor" [Hearing, 10/18-20/95, Gordon Exh. P] as a reason for the government's haste. Other prosecutors indicated that it was important to the government to convict Taylor early on in the hope that other defendants would plead guilty as a result. It is also reflected in the report that during the investigation and preparation for trial there was utter confusion as to discovery and some dissention in the ranks both at the FBI and the AUSO, and that no real guidance was provided by the FBI to SA Clemens, a first-office agent.

In addition, in light of the pending trial status of these defendants, they object on the grounds of prejudicial pretrial publicity to a press conference held by FBI Director Louis Freeh on a visit to Columbia, South Carolina, following the issuance of the OPR report, in which he announced that the government had been cleared of all misconduct allegations. This press conference by Director Freeh presents a serious problem for the court. The lofty respect inherent in his position in the minds of the public is probably unparalleled. The legal position of these defendants at this time is that they are under indictment pending trial. Although some of the evidence before this court in its consideration of the motions to dismiss for prosecutorial misconduct may not be admissible at trial under the Federal Rules of Evidence, certainly much of it would be. A pretrial public statement by the FBI Director that this evidence has already been found to be without merit is appalling to this court.

10. Continuing Discovery Problems.

This court has found that the government continued to incrementally provide evidence relative to these motions even after recusal of the USAO for South Carolina and the appointment of attorneys from the Public Integrity Section of the DOJ in Washington. A review of the record will show that, following a status conference on October 20, 1994, the court in a written order filed November 9, 1994,

> ORDERED, that the United States make available to the within-named defendants, their attorneys and agents, no later than December 1, 1994, all audiotapes and videotapes and all reports of interviews (FBI FD-302s) and agents' rough notes pertinent thereto resulting from the "Operation Lost Trust" investigation.

[Order, 11/9/94, p. 2].

Some ten protective orders and orders ruling on requested *in camera* review were then filed by the court. On March 15 and 17, 1995, defendants Taylor and Gordon filed discovery motions relative to the motions to dismiss, which were heard on April 19, 1995. On April 20, 1995, the court

> ORDERED, that all documents and/or materials in possession of the government dealing with these cases and not presently available to the defendants in the "evidence room" be produced by the government direct to the court at Charleston, South Carolina, not later than Monday, May 8, 1995, for *in camera* inspection by the court. . . . . All internal administrative documents alleged by the government to be privileged are to be designated as such upon submission.

[Order, 4/19/95, p. 3].

Twelve boxes of documents were submitted by the government to the court for *in camera* review, and a detailed 21-page discovery order was filed as to the disposition of the materials therein on July 25, 1995. In this order the court notes:

> Defendants argue that the pattern and practice of behavior by the government has instilled in them a deep sense of mistrust and that a full *in camera* inspection of all materials in possession of the government was warranted. The government, although acknowledging the existence of an "open file" policy, has continued to argue as to what is and is not discoverable pursuant to *Brady v. Maryland*, 373 U.S. 83, 83 S. Ct. 1194 (1963). In response to defendants' argument that the 65 audio tapes furnished in March 1995 should have been furnished with discovery materials for the original trials, the government claims that they dealt exclusively with drugs; that they were not turned over because they had not been and would not be used at trial, and, therefore, they were not relevant and not discoverable under *Brady*. The court finds the government's argument in this regard ludicrous. The record in these cases is clear that the drug investigation was hand-in-glove with the corruption investigation known as Lost Trust. Ten of the twenty-eight defendants pled to drug charges. Although the purpose of this order is not to address the motions to dismiss, government arguments such as this cause the court to look very closely at what was withheld by the government that may have jeopardized the rights of these defendants.

> There also has been much discussion throughout these cases of the impact of an investigation by the government into federal violations in the handling of legislation known as the capital gains tax bill that had come before the South Carolina Legislature. The defendants claim there was a cover-up by the government and that they were not furnished the discovery needed to pursue the calling and/or impeachment of witnesses. The government acknowledges the investigation but states emphatically that it found this to be a non-issue and not relevant to the trials of these defendants. Again, the court does not wish at this time to make a finding on the merits of either argument; however, inasmuch as one of the key figures in the Lost Trust investigation pled to a RICO violation, one of the predicate offenses of which was the taking of a bribe from the government's cooperating subject and key Lost Trust witness, Ron Cobb, in relation to the capital gains tax bill, the government cannot now claim that its investigation into improprieties relevant to the capital gains tax legislation was irrelevant to these cases. The court, therefore, can understand the defendants' arguments of mistrust.

[Order, 7/25/95, pp. 6-8].

This order also set forth a schedule for the filing of additional memorandums and set an evidentiary hearing on the subject motions for October 18, 1995. In the interim, the government furnished additional materials for *in camera* inspection on two separate occasions, and the court issued its rulings with regard to these materials on September 7 and October 6, 1995.

The October 6th order addresses a file received by the court which included "copies of the materials [obviously discoverable FD-302s and agents' rough notes]," and further states in pertinent part:

> It is unnecessary for the court to reiterate here the lengthy history of discovery problems in these cases. Suffice it to say that the materials furnished to the defendants and to the court on October 4, 1995, should have been furnished long ago.

[Order, 10/6/95, p. 2].

The first hearing on the motions to dismiss had been set for October 18, 1995, since the previous July. Yet here, just short of a year after the court's order establishing the evidence room and just two weeks prior to a hearing of the motions, the government was still turning over relevant evidence to these defendants. In addition, during the October 1995 hearing the existence of several FBI "CW" (Cooperating Witness) files came to light. One of the files contained an FD-302 not previously furnished to defendants. Defendants also moved for this court to reconsider portions of its July 25, 1995 order, and the court agreed to an *in camera* inspection of the CW files and several of the boxes of materials denied to defendants on July 25th. At the October hearing, the defendants also requested and received from the FBI computer-generated printouts of the inventories of the FBI's entire "Lost Trust" and "Capital Gains" files. On January 19, 1996, defendant Taylor moved the court to direct the government to provide access to all of the documents identified thereon. The court's order of February 6, 1996, as amended February 23, 1996, resulted.

The court's frustration at this point is evident in its February 6th order, which states in part:

It is well past time for discovery to be completed. Although the court in no way wishes to jeopardize the investigative methods of the federal government, it is clear from a review of the records now before it that little, if anything, contained therein can still be classified as "sensitive." Additionally, all of the materials furnished are subject to protective orders restricting the use and dissemination of these materials. The court has previously opined that a wider latitude must be given with regard to materials to be furnished for the purposes of the defendants' pursuit of their motions to dismiss for prosecutorial misconduct than might be given for trial preparation. The alleged misconduct of government attorneys and agents during the preparation and trials of these cases is the basis for the defendants' motions, and defendants' argument that they are entitled to a thorough review of the government's records is not without merit, particularly in light of the discovery history in these matters.

. . . .

. . . although there may be some justification for the delay in furnishing some materials to the defendants as ordered by the court, the volume of the materials which have surfaced just over the past few months and their possible significance to the defendants is of concern to the court.

[Order, 2/6/96, pp. 7-8].

In its Post-Hearing Memorandum, the government attempts to explain why certain files were not submitted to the court as and when ordered. As shown above, the court ordered the government to make available to the defendants all documents known by the government to be of a nature to be used by defendants to impeach witnesses or support the defendants' theories of their defenses. These cases were and are being prosecuted by various government attorneys, and for various reasons they have withheld documents that would have been of assistance to the defendants in defending the charges against them. The government now concedes that numerous mistakes were made in furnishing discovery and the DOJ/OPR in its report found that

> incremental mistakes and misjudgments were made by the FBI and prosecutors alike and, in our view, it is more plausible that these incremental failings rather than any intentional and wrongful decisions to conceal led to the failure in the first two Lost Trust cases to provide the defense with the 302s [required].

[Gov's Post-Hearing Memo, 10/18/96, p. 6]. The court cannot agree with this finding because the failings of the government to provide meaningful discovery were so numerous that it would be disingenuous to say that these mistakes were incremental failings rather than intentional or wrongful decisions. In fact, these failings, spanned over the time from the beginning of these cases until just several months ago, amount to a pattern of conduct.

In undisputed testimony on October 3, 1996 [Hearing Tr., 10/3/96, p. 182], the court was informed that prior to his trial Taylor received only 66 of the 550-plus-or-minus 302s and 26 of the 227-plus-or-minus tapes that are now in defendants' possession. The number of 302s and tapes received pretrial by the other defendants would vary only slightly.

VI. THE COURT'S SUPERVISORY POWER

In the case of *United States v. Banks*, 383 F. Supp. 389 (D.S.D. 1974), *appeal dismissed, United States v. Means*, 513 F.2d 1329 (8th Cir. 1975), that court, in a Memorandum Decision treating defendants' motion for acquittal as a motion to dismiss for government misconduct, dismissed with prejudice the charges against the defendants by the use of its supervisory power. The *Banks* court, citing to *McNabb v. United States*, 318 U.S. 332, 63 S. Ct. 608, decided that the court's supervisory power can be utilized whenever the administration of justice is tainted, and, indeed, it is the court's duty to "[establish] and [maintain] civilized standards of procedure and evidence." [*Id.* at 340]. Some of the circuits have found that demonstrable prejudice must exist in order for the court to exercise its supervisory power; however, the court in *Banks* found that it need not address whether due process was offended when the facts showed such aggravated conduct as to warrant dismissal. In the Fourth Circuit case, *United States v. Omni Intern. Corp.*, 634 F. Supp. 1414 (D. Md. 1986), Judge Black discusses the requirement of prejudice and concludes that "[a] common thread underlying many decisions is that the magnitude of the misconduct affects the use of the supervisory power, whether or not actual prejudice is shown." *Id.* at 1438. *See, e.g., United States v. Serubo*, 604 F.2d at 818 (prosecutorial conduct extreme); *United States v. Hogan*, 712 F.2d 757 (2d Cir. 1983) (misconduct flagrant); *United States v. Fischbach & Moore, Inc.*, 576 F. Supp. 1384, 1396 (W.D. Pa. 1983) (isolated incident of misconduct).

This court has weighed the seriousness of the misconduct against the available remedies, and finds that, as in the *Banks* and *Omni* cases, the misconduct here is repetitious, flagrant and longstanding. *See Banks*, 383 F. Supp. at 392; *Omni*, 634 F. Supp. at 1438; *United States v. Hogan*, 712 F.2d at 761; *United States v. Lawson*, 502 F. Supp. 158, 172. I also find that the government's misconduct "need not be so unfair

or imprudent as to offend 'due process' before exercise of this [court's] supervisory power is appropriate." *McNabb*, 318 U.S. at 340, 63 S. Ct. 608. Although this court is of the opinion that the sixth amendment right to a fair trial guaranteed to each of these defendants has been jeopardized because of the government's actions throughout these proceedings, the Constitutional issues raised by the instant motions need not be addressed.

The court is convinced that this investigation began in an appropriate fashion. It is, after all, the responsibility of the FBI and the USAO to pursue information with regard to illegal acts within their jurisdiction. It is the opinion of the court, however, that some of the investigators and lead prosecutors got lost on their way to the lofty goal of weeding out drugs and corruption from the South Carolina State House. Overzealousness and political pressure upon those in positions of authority appear to be the detours that led the government to rush to trial, especially in the cases of Taylor, Blanding and Gordon; to withhold volumes of exculpatory evidence; to allow perjured testimony to stand uncorrected on more than one occasion; to allow its primary cooperating witness, Cobb, to take an unusual amount of control of the sting operation; to go outside of its own regulations to target certain legislators, and to mislead this court to such an extent as to perpetrate a fraud upon the court.

> While lawyers representing private parties may—indeed, must—do everything ethically permissible to advance their clients' interests, lawyers representing the government in criminal cases serve truth and justice first. The prosecutor's job isn't just to win, but to win fairly, staying well within the rules. [Citations omitted]. As Justice Douglas once warned, "[t]he function of the prosecutor under the Federal Constitution is not to tack as many

> skins of victims as possible to the wall. His function is to vindicate the right of people as expressed in the laws and give those accused of crime a fair trial." *Donnelly v. DeChristoforo,* 416 U.S. 637, 648-49, 94 S. Ct. 1868, 1874, 40 L. Ed.2d 431 (1974) (Douglas, J., dissenting).

U. S. v. Koyayan, 8 F.2d 1315, 1323 (9th Cir. 1993).

Almost without exception, the lead prosecutors in these cases had practiced before this court many times, and the "open file" policy of this district and this court had never before come into question. USA Daniel was an Assistant U. S. Attorney in Charleston for several years and prosecuted high-profile, multi-defendant cases before this court. The "open file" policy was never disputed during those trials, and Daniel was totally familiar with it. As the United States Attorney guiding the prosecution of the within cases, it was his responsibility to oversee the handling of discovery. The withholding of such a voluminous array of discovery which the government had to know was exculpatory and relevant to the defenses of these defendants is unprecedented before this court. The court finds that these violations are too numerous and too specific to certain issues to be considered simply unintentional or the result of neglect. For example, it is unfathomable that the government could have possibly considered the drug investigation of Cobb prior to his employment as a confidential informant, or the investigation of Cobb, Lindsay and Greer in the capital gains tax investigation, as anything *but* relevant.

Even more offensive to the court is the continual misrepresentations made to the court that all discovery to which the defendants were entitled had been turned over to them. The government had to have been aware of so much information that incriminated public figures holding powerful positions, yet it did not submit to the court for review the discovery it claimed would jeopardize on-going investigations or that it

claimed to be irrelevant. The constant assurances that "we have given them everything," the veracity of which the court had no reason at that time to question, rises to the level of outrageous conduct. It would be impossible to cite to each instance where this type of assurance was repeated.

It appears that in these cases, much of the government's misconduct actually stems from its failure to disclose evidence to the defendants. In the case of *United States v. DeMarco*, 407 F. Supp. 107 (C.D. Cal. 1975), the withholding of exculpatory evidence alone was sufficient to grant a dismissal of the indictment, albeit without prejudice.

> "His [the prosecutor's] duty is to provide exculpatory evidence to the defense and then seek to rebut it before the trier of fact. It is not the prosecutor's function to structure a proceeding in such a way that exculpatory material is concealed from the defense, the court, and the jury."

Id. at 112.

In addition, the court finds that the government, during the period following remand of these cases and in connection with the instant motions, continued its course of action with regard to the disclosure of evidence, in violation of court orders. Its attitude concerning discovery continued well into 1996, even after the court admonished it that the determination of relevancy of the materials relating to the motions to dismiss was within the jurisdiction of the court and not the government.

The court is of the opinion that an investigation and subsequent prosecution of what might have started out with the altruistic motive of ridding the State Legislature of drugs and political corruption became a political bombshell that backfired. The entire Lost Trust matter was a political "coup"

as well as a political "hot potato" for the United States Attorney's Office. USA Daniel called a press conference to announce the initial indictments. The defendants had claimed that this press conference constituted prejudicial pretrial publicity and they now question whether authority for it was even given USA Daniel, as required, by the Department of Justice. No substantial evidence one way or the other on the question of authority was ever offered, nor does the court find that the defendants have offered any additional testimony to meet the burden of proving that they were directly prejudiced by this press conference.[39]

This press conference did create, however, an atmosphere of public expectation from which the government could not retreat, even when the investigation led to roads it did not want to travel. When they chose Cobb as the focal point of the sting, they had to carry all the baggage he brought with him—his drug use, his refusal to involve Lindsay, his apparent inability to be totally truthful, and his unwillingness to follow instructions. The government lost control of its star witness, both during the sting operation and during his testimony at the trials. This allowed Cobb to choose the legislators he wished to solicit, specifically, Derrick, Gordon and members of the Black Caucus—for whatever his purposes—and to protect

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[39]The court would take note, however, that it was inappropriate for the USAO to conduct that press conference from a courtroom in the United States Courthouse. The Department of Justice is an arm of the Executive Branch of the government of the United States. In this court's opinion, under the "separation of powers doctrine" of the United States Constitution, the use of a Federal courtroom by the Department of Justice to further its prosecutorial position blurs the distinction between the adversary nature of the prosecution and the "blind justice" nature of the courts, which operate under the Judicial Branch of the United States government.

those he wished by characterizing—as he saw fit—the payments he made to them, even to the point of perjuring himself with regard to payoffs he made to Lindsay. Evidence of how Cobb often paid various legislators a few hundred dollars to "keep them friendly" and that it was no concern of his how the recipients handled the monies, was not furnished by the government so as to allow the defendants to attempt to impeach Cobb's testimony that the payments he made to these defendants (excluding Long) were known by him and by them to be bribes.

The court further finds that the government did, in fact, allow testimony from Cobb, Clemens and Greer that it knew to be untrue to stand uncorrected. This court shares the concern expressed by the court in *United States v. Wallach*, 935 F.2d 445, 457 (2d Cir. 1991): "We fear that given the importance of [a witness's] testimony to the case, the prosecutors may have consciously avoided recognizing the obvious—[that he] was not telling the truth."

Once the government entered into the agreement with Cobb that he would never have to testify against Lindsay, it put itself in an untenable position. Its cases against these defendants rested in large measure on Cobb's testimony at trial. Sufficient evidence has now been disclosed to prove that Cobb did pay a bribe to Lindsay in connection with the capital gains tax bill and, further, that Cobb admitted as early as May 1, 1989, that he had paid Lindsay a bribe in connection with the oil jobbers bill. His sworn testimony that he never paid Lindsay a bribe was perjurious several times over. Unfortunately, SA Clemens had helped to dig the hole in which he found himself and, apparently, felt he had to play out the scenario to the end.

When the government found itself in a position which forced it to investigate Greer, the situation became even more explosive. There is no way the court can ignore the

inconsistencies in and omissions from the record in the matter of Greer and the capital gains tax bill. The government's actions as outlined in this order suggest a total avoidance of pursuing information that might have proved adverse to Greer. The record is replete with implications that Greer was heavily involved in the payoffs related to the capital gains tax bill, yet no FD-302s or agents' rough notes of any debriefings of Greer regarding capital gains and no indication the government ever sought to review his financial records can be found. Even the information advanced by the government at Greer's sentencing that would tend to be in Greer's favor is not substantiated by anything in the record. His testimony before the Grand Jury would have to be perjured if the arguments advanced by the government at Greer's sentencing hearing are true. Alternatively, if Greer told the truth to the Grand Jury, then the government has lied to the court. The government's failure to fully investigate Greer might be excused as falling within the province of the government's prosecutorial discretion if his alleged involvement was isolated. The fact that it surfaced in an investigation resulting in the convictions of these defendants and may have had an impact on the fairness of their trials puts the government's handling of Greer's involvement in an entirely different light.

Most offensive to the court, however, is that the government sat silent—when it knew that its silence would not only foil the efforts of the defendants to fully develop defenses to which they were entitled, but would misrepresent facts to both the Grand Jury and the trial jury, and mislead the court to such an extent as to effect its rulings at trial and in collateral proceedings. As reluctant as this court is to call it such—this silence in several instances constitutes subornation of perjury.

This court will not shrink from its share of responsibility and admits its total reliance on the government's representations, at least through the original trials. It did warn the government on numerous occasions that, if it was not being

candid and forthright, the court would take the appropriate steps available to it. Without the defendants' unrelenting pursuit of their motions, however, much of what is now known may never have seen the light of day. The government attempts to show its willingness to own up to any misconduct in a footnote to its final memorandum, stating that it was the expanded discovery voluntarily furnished by the government following remand that led to these motions and not the defendants' own investigative work or requests under the FOIA. [Gov's Post-Hearing Memo, 10/18/96, p. 29, ftn. 13]. Considering the on-going discovery problems in these cases, the court finds this absurd. Because the Fourth Circuit Court of Appeals was also unaware of the substantial amount and probative content of discovery materials withheld, had these cases not been remanded for retrial on entirely different grounds, the convictions of these defendants would stand. It was not until the first wave of discovery for retrials, which contained numerous previously withheld documents, was furnished in November of 1993 that the court had any reason to believe that some of its previous rulings were based on limited and/or erroneous information. Thereafter, for the purposes of the motions to dismiss, it allowed great latitude in the disclosure of discovery materials. Only then was the wide-ranging scope of the government's misconduct available to the defendants and apparent to the court. There is no way to avoid the conclusion that the various and repeated acts of the government were simply wrong; that the government acted in bad faith, and its misconduct is not only greatly offensive to this court, but has interfered with this court's duty to insure the proper administration of justice.

In summary, the court is of the opinion that the evidence of the government's misconduct from the time this investigation commenced until the present, in its totality, is sufficiently egregious to warrant dismissal of these indictments with prejudice under the doctrine of supervisory power. It is, therefore,

ORDERED, that the Superseding Indictment in Criminal Nos. 3:90-00339 and 3:90-00434 against defendants LUTHER LANGFORD TAYLOR, LARRY BLANDING and BENJAMIN J. GORDON, JR. be, and the same is hereby dismissed with prejudice. It is

ORDERED FURTHER, that the Indictment in Criminal No. 3:91-00091 against defendant PAUL WAYNE DERRICK be, and the same is hereby dismissed with prejudice. It is

ORDERED FURTHER, that the Indictment in Criminal No. 3:91-00384 against defendant JEFFERSON MARION LONG, JR. be, and the same is hereby, dismissed with prejudice.

AND IT IS SO ORDERED.

FALCON B. HAWKINS
United States District Judge

Charleston, S.C.

February 28, 1997.

UNITED STATES COURT OF APPEALS

FOR THE FOURTH CIRCUIT

FILED
January 25, 1999

No. 97-4230
CR-91-91-FBH

UNITED STATES OF AMERICA

Plaintiff - Appellant

v.

PAUL WAYNE DERRICK

Defendant - Appellee

DALE L. DUTREMBLE; E. BART DANIEL; RICHARD GREER

Amici Curiae

and

CHARLESTON POST AND COURIER

Movant

No. 97-4231
CR-91-384-FBH

UNITED STATES OF AMERICA

Plaintiff - Appellant

v.

JEFFERSON MARION LONG, JR., a/k/a Bud

Defendant - Appellee

DALE L. DUTREMBLE; E. BART DANIEL; RICHARD GREER; ALVA TAYLOR BROWN, Personal Representative of the Estate of LUTHER LANGFORD TAYLOR; NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS

Amici Curiae

CHARLESTON POST AND COURIER

Movant

No. 97-4232
CR-90-434-FBH

UNITED STATES OF AMERICA

Plaintiff - Appellant

v.

LARRY BLANDING

Defendant - Appellee

DALE L. DUTREMBLE; E. BART DANIEL; RICHARD GREER; ESTATE OF BENJAMIN J. GORDON, JR., a/k/a B. J. Gordon; ALVA TAYLOR BROWN, Personal Representative of the Estate of LUTHER LANGFORD TAYLOR; NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS

Amici Curiae

and

CHARLESTON POST AND COURIER

Movant

On Petition for Rehearing and Rehearing En Banc

Appellees filed a petition for rehearing and rehearing en banc.

Judges Widener, Niemeyer and Judge Luttig voted to deny the petition for rehearing.

A member of the Court requested a poll on the petition for rehearing en banc. The poll failed to produce a majority of judges in active service in favor of rehearing en banc. Judges Murnaghan, Ervin, Hamilton, Michael and Motz voted to rehear the case en banc, and Chief Judge Wilkinson, Judges Widener, Niemeyer, Luttig, Traxler, and King voted against rehearing en banc. Judges Wilkins and Williams were disqualified from participating in the case.

The Court denies the petition for rehearing and rehearing en banc.

Entered at the direction of Judge Luttig for the Court.

For the Court,

/s/ Patricia S. Connor
CLERK

UNITED STATES COURT OF APPEALS

FOR THE FOURTH CIRCUIT

FILED
February 9, 1999

No. 97-4230
CR-91-91-FBH

UNITED STATES OF AMERICA

Plaintiff - Appellant

v.

PAUL WAYNE DERRICK

Defendant - Appellee

DALE L. DUTREMBLE; E. BART DANIEL; RICHARD GREER

Amici Curiae

and

CHARLESTON POST AND COURIER

Movant

No. 97-4231
CR-91-384-FBH

UNITED STATES OF AMERICA

Plaintiff - Appellant

v.

JEFFERSON MARION LONG, JR., a/k/a Bud

Defendant - Appellee

DALE L. DUTREMBLE; E. BART DANIEL; RICHARD GREER; ALVA TAYLOR BROWN, Personal Representative of the Estate of LUTHER LANGFORD TAYLOR; NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS

Amici Curiae

CHARLESTON POST AND COURIER

Movant

No. 97-4232
CR-90-434-FBH

UNITED STATES OF AMERICA

Plaintiff - Appellant

v.

LARRY BLANDING

Defendant - Appellee

DALE L. DUTREMBLE; E. BART DANIEL; RICHARD GREER; ESTATE OF BENJAMIN J. GORDON, JR., a/k/a B. J. Gordon; ALVA TAYLOR BROWN, Personal Representative of the Estate of LUTHER LANGFORD TAYLOR; NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS

Amici Curiae

and

CHARLESTON POST AND COURIER

Movant

ORDER

Appellees, Paul Wayne Derrick and Jefferson Marion Long, Jr., have filed a motion to stay the mandate pending application to the United States Supreme Court for a writ of certiorari.

The Court denies the motion.

Entered at the direction of Judge Luttig, with the concurrence of Judge Widener and Judge Niemeyer.

For the Court,

/s/ Patricia S. Connor
CLERK